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REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. VII.

Third Edition, with additional Notes and References

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JUDGES

OF

THE SUPREME COURT OF JUDICATURE

OF

THE STATE OF NEW-YORK,

DURING THE TIME OF

THE SEVENTH VOLUME OF THESE REPORTS.

JAMES KENT, Esq., *Chief Justice.*

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DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the twentieth day of July, in the thirty-sixth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. VII."

In conformity to the act of the Congress of the United States, entitled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An Act supplementary to an act, entitled, An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

CHARLES CLINTON.

Clerk of the District of New-York.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN NOVEMBER TERM, IN THE THIRTY-FIFTH YEAR OF OUR
INDEPENDENCE.

PHILLIPS *against* COVERT and COVERT.

THIS was an action of trespass. The declaration contained three counts: 1. For breaking and entering the *close* of the plaintiff, and treading down and destroying the grass, &c. 2. For breaking and entering the plaintiff's *close*, and cutting down his trees, &c. 3. For breaking and entering the *close* of the plaintiff, and taking and carrying away the goods and chattels of the plaintiff, &c. Plea, *not guilty*.

The cause was tried at the *Dutchess* circuit, *August*, 1809, before Mr. Justice *Spencer*.

A witness for the plaintiff testified, that about ten years ago, he surveyed lot No. 2 in *Phillips's Patent*, and laid it out into forty-nine farms; that farm No. 31 was at that time possessed by *William Lovelace*, who acknowledged that he held under the plaintiff.

**Amos Belden* had been an agent for the plaintiff for about eighteen years, during which time the persons in possession of lands in No. 2 acknowledged the plaintiff as owner, and paid rent to him. The tenants have no leases, but go on the land, with the permission of the plaintiff, and hold at his will. When a tenant transfers his possession, application is made to the agent, and if he agrees to the change of tenants, the name of the new tenant is inserted in the rent-book. Notice was given

Trespass lies against a tenant *at will* for a voluntary waste, as in cutting timber; for the injury amounts to a determination of the tenancy. (a)

A tenant at will is considered as holding from year to year, only for purpose of a notice to quit; but he has no right to such notice, after he

[* 2]
has determined the will, by an act of voluntary waste. (b)

(a) *Steffen v. Townsend*, 9 Johns. Rep. 35. *Cooper v. Stower*, Id. 331. *Erwin v. Olmsted*, 7 Cowen, 229.

(b) *Bradley v. Covel*, 4 Cowen, 349. *Nichols v. Williams*, 8 Cowen, 13. *Jackson v. Balmon*, 4 Wendell, 321. *Jackson v. Miller*, 7 Cowen, 747.

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Nov. 1810.

PHILLIPS
v.
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to the persons in possession not to cut more timber than was necessary for their farms. The defendants never offered themselves as tenants; nor have they been recognized as such by the plaintiff; nor have their names been entered in his book; nor has any rent been demanded or received of them.

William Lovelace had been in possession of farm No. 31, containing 400 acres, for several years; and his name was entered in the plaintiff's rent-book, and he paid rent to the agent. He had no lease, but was to hold the land as long as he behaved well, and paid rent. He afterwards sold 100 acres of his possession to *Samuel Den* and *Samuel Denny*, who each went into possession of a part of the 100 acres, having obtained the consent of the agent. They paid some rent to the agent. *Denny* continued in possession; but *Den* left his part, and went away, and the defendants came on that part of the land which *Den* had left. *Lovelace* had given the defendants a quit-claim for the part in their possession; but it was after most of the timber had been cut down. It was proved that the defendants had cut considerable quantities of timber and wood on the part of the land in their possession, which was the *locus in quo*.

The judge having expressed an opinion, that, on the facts, as they appeared in evidence, the plaintiff could not recover, the plaintiff submitted to a nonsuit, with leave to move the court to set it aside.

[*3]

*A motion was accordingly made to set aside the nonsuit.

Emott, for the plaintiff. Trespass lies in this case. In *Campbell v. Arnold*, (1 *Johns. Rep.* 511.) the court, by saying a possession in fact was necessary to maintain trespass *quare clausum fregit*, did not mean that an actual occupancy was requisite. For the owner of the soil, having the possession in law, may maintain trespass. In *Cortelyou v. Van Brundt*, (2 *Johns. Rep.* 357.) it was held that the owner of the land, used as a public highway, might maintain trespass for any exclusive appropriation of the soil. In *Tobey v. Webster*, (3 *Johns. Rep.* 361. 2 *Roll. Abr.* 531. N. pl. 3, 4. *Litt. sect.* 71. *Co. Litt.* 57. a. *Dyer*, 121. b. *Saville*, 84.) the court said that a landlord might maintain trespass against a tenant at will, for any waste or destruction, because such an injury to the freeholder was a determination of the estate. Here was a mere tenancy at will; and though, by the modern determinations, it is held to be a tenancy from year to year, this does not vary the rights and remedies of the parties. If a tenant from year to year does any act disclaiming or disavowing the landlord, he may be treated as a trespasser. (*Bull. N. P.* 96. *Peake's N. P.* 196, 197.) Now a destruction of the timber is equivalent to such a disavowal; for it is acting as owner.

According to modern decisions, no action of *waste* will lie

against this sort of tenants; and the landlord, if he cannot maintain trespass, would be without remedy.

The act to prevent trespasses on land, (23 sess. c. 94.) [2 R. S. 333. sec. 1.] gives *treble* damages, to be recovered by an action of trespass; and it was, no doubt, the intention of the act to reach cases like the present; but if trespass is held not to lie, *treble* damages cannot be recovered.

Again, the defendants were not tenants of the plaintiff, but mere strangers. Their names were not entered in the rent-book, nor does it appear that they were considered by the plaintiff as his tenants.

Lovelace, or *Den*, who was a mere tenant at will, could not assign, without the consent of the plaintiff. (*Co. Litt.* 57. a. 2 *Esp. Rep.* 505.) *And by the statute of frauds, (10 sess. a. 44. s. 10.) [2 R. S. 134. sec. 6.] no lease, estate, or any interest in land, can be assigned, unless in writing; and the greater part of the trespass complained of was committed before any assignment was made to the defendants.

Again, where the trees are reserved by the landlord, trespass lies against the tenant for cutting them down. (*Bull. N. P.* 84. *Bro. Tresp.* 55. *Comberb.* 453.) So, after trees are cut down and suffered to remain on the land, trespass lies for taking and carrying them away.

Tallmadge, contra. *Lovelace* had a right to transfer his interest to the defendants, so as to constitute them tenants. A tenancy at will is at the will of both parties. (*Co. Litt.* 55. a.)

[*KENT*, Ch. J. The statute of frauds defines an estate at will. Tenancies at will are now held to be estates from year to year, merely for the sake of a notice to quit. As to every other purpose they are regarded as mere tenancies at will.]

Here was a letting without any determinate period of time, and rent reserved. It was, therefore, a tenancy for years; (3 *Term Rep.* 3. 3 *Burr.* 1609.) and the tenant was entitled to notice to quit, and might assign his interest.

The law by which the present case is to be decided has been settled by this court in *Campbell v. Arnold*, (1 *Johns. Rep.* 512.) and *Tobey v. Webster*. (3 *Johns. Rep.* 468.)

Occupation implies possession, and trespass can only be brought by him who is in the possession of land. (5 *East's Rep.* 485.)

The proper remedy of the plaintiff is by an action of waste, or an action on the case. (3 *Lev.* 131. 209. 3 *Wooddes.* 193.) This is an action of trespass *quare clausum fregit*, which is very different from an action *de bonis asportatis*.

Per Curiam. There is no doubt but that an action of trespass will lie against a tenant at will for voluntary *waste, as in the cutting of timber; for the injury amounts to a determination of the will and of his possession. (*Co. Litt.* 57. a. 5 *Co.*

NEW YORK
Nov. 1810.

PHILLIPS
v.
COVERT.

[* 4]

[* 5]

NEW-YORK,
Nov. 1818.

JACKSON
v.
MURRAY.

13. a. *Oro. Eliz.* 777. 784.) The defendants in this case were nothing more than tenants at will, for the purpose of this action, even if they were entitled to be considered as holding from year to year, for the purpose of a notice to quit; and they would have had no right to such notice, after they had determined the will. The nonsuit must be set aside, and a new trial awarded, with costs to abide the event of the suit.

Rule granted.

JACKSON, *ex dem.* STOUTENBURGH and others, *against*
MURRAY.

The boundary of the tract of land on New-York island, called *Gregory's plantation*, is not to be construed to extend west of the old *Harlaem* road.

Where an agreement for the sale and conveyance of a piece of land, dated in 1689, [* 6] was produced in evidence, the jury were allowed, in 1809, to presume a conveyance pursuant to the agreement. (a)

An old patent or grant, after the lapse of 160 years, will not be allowed to be located, or extended beyond the actual and notorious possession and location of the party, especially where there is the slightest evidence of an adverse possession for above 20 years.

In all cases of any uncertainty in the location of patents and deeds, courts hold the party to his actual location. (Vid. *Jackson v. Ogden*, *infra*, 238.)

Government is never to be presumed to grant land twice; and where K., who purchased, in 1689, land granted to S. in 1667, took out a patent in 1671, which included land said to be covered by the first patent, the persons deriving title under K. were estopped to say, that the location of the first grant extended so as to include any part covered by the second patent.

(a) For the principles which regulate the presumption of grants and conveyances, see *Jackson v. McCall*, 10 Johns. R. 377. *Jackson v. More*, 13 Johns. R. 523. *Jackson v. Cole*, 4 Cowen, 567. *Jackson v. Miller*, 6 Cowen, 751. *Jackson v. Lamb*, 7 Cowen, 431. *Jackson v. More*, 6 Cowen, 706. *Jackson v. Schaubert*, 7 Cowen, 187. *Jackson v. Davis*, 5 Cowen, 123. *Jackson v. Harrington*, 9 Cowen, 86. *Doe v. Phelps*, 9 Johns. R. 169. *Schauber v. Jackson*, 2 Wendell, 13. *Jackson v. Mansius*, *Id.* 357. *Doe v. Butler*, 3 Wendell, 149. *Jackson v. French*, *Id.* 337. *Jackson v. Russell*, 4 Wendell, 543. *Jackson v. Miller*, 6 Wendell, 228. *Freest v. Grant*, 6 Wheat. 504. *Ricard v. Williams*, 7 Wheat. 59. *Eight's Lease v. Rochester*, *Id.* 636.

Henry Piers, unto Peter Stoutenburgh," &c., and the same was confirmed, by the new patent, to Peter Stoutenburgh, his heirs, &c.

NEW-YORK

Nov. 1810.

JACKSON
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The plaintiff also gave in evidence two papers in the Dutch language, and a map, found in a trunk of the deeds and documents of the Kip family; one of which was a paper dated 29th December, 1679, signed by Peter Stoutenburgh and Jacob Kip, concerning the leasing of the land, &c. west of Kip's land, and east of the land of William Beekman, called Peter Van Lind's plantation, to the said Kip, for eight years, at ten guilders a year. The other paper between the same parties was dated March 25th, 1688—9, and related to a purchase of the same land, for 1,400 guilders. These papers were translated by Mr. Van Ingen of Albany, who had been employed to translate the Dutch records in the office of the secretary of state. The map was dated the 29th June, 1699, and purported to have been made by Augustus Graham, surveyor-general of the colony of New-York. The map was proved by Charles Clinton, a surveyor, who had frequently seen maps purporting to be made by the same surveyor-general. This evidence was objected to, but admitted by the judge. The plaintiff also proved, by two surveyors, the existence of an ancient fence, which had been, immemorially, a partition fence between the tracts of Stoutenburgh and Beekman, and which was crooked in different places, so as to vary its course several degrees. The same witnesses also proved the existence of a remarkable rock, near the mouth of a creek running from a pond near the premises in question, to the East River; near which rock, the water of the creek runs into the river; and that it answers the description of the rock mentioned in the Dutch patent, better than any other, and, in their opinion, was, no doubt, the rock intended; though there are several other places in the creek, where the water runs over the stone, in a remarkable manner. That, in locating Stoutenburgh's premises, reference was had to the ancient fence, as an established boundary, and to the said rock, as a fixed object; and the courses and distances corresponded with that located in the patent, which the surveyors were of opinion was the only true location; and that, according to this location, made with peculiar care, the premises in question were included within the patent to Stoutenburgh.

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The plaintiff further proved, that all the land lying east of the fence on the highway, had been enclosed, and in the possession of the Kip family, from time immemorial. The heirship of Kip, one of the lessors, was also proved. Abraham Van Gelder, aged 92 years, a witness, stated that old Samuel Kip made bricks near the pond; but he could not testify that the Kip family exercised any acts of ownership over any lands lying west of the Harlaem road.

The defendant then moved for a nonsuit, which was refused by the judge, on the ground that the jury might presume a

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grant from *Stoutenburgh* to the ancestor of *Kip*, the lessor, for all the lands included in his patent, though he appeared to have possessed only a part of them.

The defendant then showed title under the corporation of *New-York*, partly by a deed in fee, dated 25th *February*, *1799, and partly by a lease, dated the 8th day of *November*, 1803, for the term of 21 years.

The defendant also gave in evidence the charter of the city of *New-York*, of 1730, reciting the former charter granted by Governor *Dongan*, dated the 22d *April*, 1686, in which a grant is made to the corporation of all the waste, vacant, unpatented and unappropriated lands, within the city, and on *Manhattan* island; also a map of thirty-one lots, and a sale at auction of the leases of the lots, made by order of the corporation, in *July*, 1763; but no possession was taken of the lots, until after the sale to the defendant, in 1799. It was also proved, that the highway, or *Harlaem* road, had run as it now does, for more than sixty years; and that the fence of *Kip* was on the east side of the road during that time, and the south-west corner of the fence did not come up to the road. That many persons made bricks round the pond, before the war. Two surveyors made a map of a survey, locating the patent of *Van Linden* and *Piers*, which corresponded with the defendant's map.

The defendant also gave in evidence, a patent, in 1671, to *Jacob Kip*, under whom the plaintiff claimed, for a piece of waste land, bounded on the north-west side by the old highway, and between the land of *Holmes* and *Peter Stoutenburgh*, and bounded, on the north-east and south-west sides, by two small creeks or kills, &c., and also several old maps, &c.

The defendant contended, 1. That the corporation of *New-York* had been in possession of the premises in question, more than 20 years before the commencement of the present suit; 2. That the patent to *Stoutenburgh* did not include the premises. On the part of the plaintiff, it was insisted, that the patent to *Stoutenburgh* did cover the premises; and that no adverse possession had *been shown, sufficient to bar the plaintiff's right of recovery.

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The judge charged the jury, that he did not think such a possession was proved in the corporation of *New-York*, or their assigns, as would toll the entry of the lessor of the plaintiff, if he had shown a title, though this title had remained dormant, and no actual possession in the lessors proved; that if the survey of *Graham* was considered as exhibiting the measure that was in use, the patent to *Stoutenburgh* would, in the south part, extend to the east of the *Harlaem* road; that if the transaction was recent, he should incline to this construction, and think the patent might be rolled out; but there was one fact in the case, in favor of the defendant, which, in his opinion, ought to control the verdict. The government could not be presumed to grant land twice; that the grant to *Kip* for all the

land between the creeks, was only four years after the grant to *Stoutenburgh*, and purports to be founded upon a survey of the surveyor-general, and covers all the land claimed by the plaintiff's construction, lying north of the lower creek, and east of the *Harlaem* road.

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The jury found a verdict for the plaintiff.

A motion for a new trial was made, on the part of the defendant, on the following grounds.

1. That the plaintiff is not entitled to recover, because he does not show a title from *Henry Piers*, the original patentee, to *Stoutenburgh*, under whom the plaintiff claims.

2. That the plaintiff shows no conveyance from *Stoutenburgh* to *Kip*, through whom he derives his title.

3. The plaintiff proves no possession, or right of entry, within twenty years; but on the contrary, the defendant shows an adverse possession.

4. That the grant to *Piers*, or the confirmation to *Stoutenburgh*, includes no part of the premises in question.

*5. That the grant to *Beekman*, and the map, purporting to be made by *Augustine Graham*, ought not to have been admitted in evidence.

6. That the verdict is against law and evidence.

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Colden and *Hoffman*, for the defendant.

Harison and *Emmet*, for the plaintiff.

KENT, Ch. J., delivered the opinion of the court. The lessors of the plaintiff have shown a title under the patent of Governor *Nicholls*, in 1667, to the lands covered by the former *Dutch* patent, and known by the name of *Gregory's plantation*. There was abundant reason for the jury to presume a conveyance from *Stoutenburgh* to *Kip*. On that point there can be no controversy. The great point is, the location of the patent. If it was a recent case, and we were to follow the words of the patent, I might, perhaps, concur in the location of the plaintiff; but there are several strong reasons why we ought, at least, to doubt, and why we ought not, at this late day, to admit the claim of the plaintiff. The old *Dutch* patent speaks of the plantation as stretching between *Peter Lindo's* plantation, and the creek or kill, and that it was in length, "to the said creek or kill," 187 rods, &c. It no where speaks of crossing the creek, but the creek is twice mentioned, as being an exterior boundary. There is also a great uncertainty as to the real extent or kind of measure used and intended in the grant, and as to the commencement of *Lindo's* patent at the mouth of the *Ouder-rack* creek. The ancient fence between the *Lindo* and *Gregory* plantations was very crooked; and nothing can be more vague than a place on the creek, "where the water runs over the rock." To undertake, now, to locate so vague

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a description as that contained in this *Dutch* patent, issued above 160 years ago, and to carry that location *further* *than the parties in interest had ever located it, by any actual *pedis possessio*, or mark of ownership, from its date to this day, appears to me to be dangerous and inadmissible. The parties ought not now to go beyond their ancient fences, or actual and notorious location; and, especially, if there has existed the slightest marks of adverse possession, for above twenty years, on the ground to which they now wish to advance. In this case, the sales by the corporation, in 1763, were acts of ownership of lands lying west of the old *Harlaem* road, and now covered by the plaintiff's location. That the persons under whom the lessors claim never carried their actual possession west of the old road, is a fact beyond dispute. This ought, in such a case as the present, to be considered as a practical location of the patent, by the party who claimed under it. (a)

In all cases of any uncertainty in the location of patents and deeds, courts hold the party to his *actual* location; and we cannot admit of such an excuse as "a remarkable inactivity and negligence" in the ancestor. Every difficulty, and every doubt, ought to be turned against the party who now attempts to push his location beyond the road, after having, for such an enormous lapse of time, confined the actual location to the east side of it. As to the N. E. side of *Gregory's* plantation, we are necessarily deprived of evidence of the location which the parties would have originally given to it, from the circumstance that *Kip*, who purchased this plantation from *Stoutenburgh*, had already taken a patent for land lying over the creek. This fact appears to me, as it did to the judge at the trial, of decisive weight in the controversy. The government, in 1671, and all parties in interest, knew better, at that day, than we can pretend to know, what was the true location of *Gregory's* plantation. The premises lay almost under the daily observation of the government, and of the claimants. The original patent, in 1647, was of a *piece of land then known and distinguished as *Gregory's* plantation, and it probably then had its bounds on the *East River*, designated by notorious occupancy. The very term used denoted an inhabited spot; and 20 years afterwards, when the notoriety of the plantation and of its bounds must have increased, the patent of confirmation uses the same description. After this, we find the ancestor of the plaintiff suing out a patent for a piece of waste land, lying between *Holmes's* land and this very plantation of *Gregory*, and bounded on the N. E. and S. W. sides, "with two small creeks or kills, and on the N. W. by the old highway." It is manifest that this tract was bounded on the S. W. side by the patent of *Stoutenburgh*; and yet it is described to be bounded by a creek; a decisive proof that

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(a) Vid. *Jackson v. Schoonmaker*, inf. 12. *Jackson v. McCall*, 10 *Johns. Rep.* 377. *Jackson v. Schenck*, 13 *Johns. Rep.* 346.

Gregory's plantation was not then understood to pass the creek, however plausible the contrary construction may now appear.

Upon the whole, the attempt now, for the first time, to extend *Gregory's plantation* west of the old *Harlaem* road, is not to be permitted; and the verdict ought to be set aside, and a new trial awarded, with costs to abide the event of the suit.

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JACKSON, *ex dem.* HARDENBERGH, *against* SCHOON-
MAKER.

THIS was an action of ejectment, for land in the town of *Rochester*, in the county of *Ulster*, and was tried at the *Ulster* circuit, in *September*, 1809, before the *chief justice*, and a struck jury.

*The controversy, relative to the premises in question, has been several times before the court, and various questions decided. [See 2 *Johns. Rep.* 230. 4 *Johns. Rep.* 161. 390.] The single point now decided, related to the location of the deeds under which the plaintiff claimed; and it is unnecessary to detail the evidence given at the trial, as it could not be understood, without a reference to the maps and surveys.

The plaintiff deduced his title from the patent of *Rochester*, in 1763, to the trustees of *Rochester*. In 1717, *Jacob Dewitt* and others, trustees of *Rochester*, conveyed to *L. Cole*, senior, a piece of land described as follows: "All that certain piece or parcel of land, lying and being at *Rochester*, beginning on the south side of *Rondout Kill*, over the *Stoney Kill*, owned by the name of *Cripple Bos*, lying on the west side of *Harman Hendrickson Rosekran's* land, beginning on the south side of the *Stoney Kill*, by the mouth of a running water, where it runs into the *Stoney Kill*, and so along the outside of the running water, to the *Indian marked tree*, standing on the south-west side of the said run of water; from thence all along the outside of the aforesaid run of water, against the south-west bounds of *David Dubois*; and from thence north to his south-west corner, and all along his bounds to the bounds of *Leonard Cole*, senior, and from thence all along his bounds against the first station, and from thence straight over the first station, from whence it begins." This deed was acknowledged, the 12th of *November*, 1751, by *Jacob Dewitt*, one of the grantors, who proved that

Where a grant of land, made in 1717, mentioned a "running stream of water," as one

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of the boundaries; and no actual location of the premises was made by the grantee or his heirs; the court refused, after the lapse of near a century, to extend a description, vague and uncertain, from a running stream which would take in the least, to a running stream which would include the greatest portion of land, so as to disturb ancient possessions between the two streams. Every presumption, after such a lapse of time, is to be taken against a party, who neglects to have his land surveyed, and its boundaries accurately defined, or to reduce them into actual location, to the narrowest

at the time; and the description in his deed will be construed, so as to reduce his grant to the narrowest limits. (a)

(a) *Jackson v. Schenck*, 13 *Johns. Rep.* 346. *Finley v. Williams*, 9 *Cranch*, 164.

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the other two grantors, who were then dead, had also executed the deed.

The deed from *Leonard Cole*, son and heir of *Leonard Cole*, senior, to *Jehosaphat Dubois*, was dated the 30th of *October*, 1751, and was acknowledged the 11th of *November*, 1751. It contained the same description as that in the deed of 1717.

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*The question now raised was as to the true location of the premises, described in these deeds; or the true meaning and construction thereof.

The cause was argued by *Tallmadge* and *Sudam*, for the plaintiff, and *E. Williams* and *Rudd*, for the defendant.

KENT, Ch. J., delivered the opinion of the court. This cause is submitted to the court, upon the legal operation and true construction or location of *Cole's* deeds, of 1717 and 1751. The claim, under these deeds, has been several times before the court; but this is the first time that the cause has turned upon their location.

The question is, What stream was meant by the *running water*, in *Cole's* deed? Was it the stream now called the *Sander's Kill*, or the stream now called the *Mill Creek*?

It ought to be recollected, that we are inquiring into the meaning of a description of a piece of land, which was granted as early as 1717. *Coles*, the grantee, does not appear to have ever reduced the bounds of his grant to actual location. The deed slept quietly, from the time it was given, for 34 years, until the year 1751, when it was acknowledged and recorded; and the son and heir of *Coles* sold the land by the same description given in his father's deed. No actual location was made of the grant in the life-time of *Dubois*, though he lived six years after the date of his deed; and now, after the lapse of near a century, his representatives call upon the court to carry a description vague in itself, and rendered extremely so by time, from a running stream which would take in the least, to a running stream which would take in the greatest portion of land; and this at the expense of very long and ancient settlements, between the two streams. In a case of such antiquity, every presumption should be turned against the party who neglected, at the time, to have the land surveyed, and accurately defined, *or to reduce it to actual location, when the common parlance of the country was well understood, and monuments were fresh and notorious. This principle is, of itself, sufficient to decide this cause against the plaintiff; for it must be admitted, that nothing can be more difficult than to endeavor to find out, at this day, what and where were the *Cripple Bos*, the *running water*, and the *Indian marked tree*, mentioned in the deed of 1717. If there be two running streams which will each of them tolerably well answer to the description in the deed, the plaintiff ought now to be confined to that which will reduce

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his grant to the narrowest limits. His grant was likewise to be located on the west side of *Harman Henderson Rosekran's* land. This alludes to *Rosekran's* land, as a matter of claim and possession; and if the patent to *Beekman and Hendricks*, in 1680, was never granted upon actual survey, but by vague and indefinite terms, and the claimants under that patent did, for a period, as far back, at least, as the memory of witnesses can reach, extend their possessions east of *Sander's Kill*, the grant to *Cole* must lie west of those possessions.

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But if we were now to search for the monuments and bounds of *Cole's* deeds, the weight of testimony is greatly in favor of the *Mill Brook* being the *running water*, mentioned in the deeds. In addition to the force of a number of circumstances which need not now be detailed, there were four surveyors examined upon the trial, as witnesses, and three of them locate the deeds upon that brook, as best corresponding with the description in the deeds, and the actual view and state of the premises; and the other surveyor admits, that if *Rosekran's* land did, in fact, extend west of the *Sander's Kill*, as was shown on the part of the defendant, he should also concur in the location contended for by the defendant.

*For these reasons, judgment ought to be rendered for the defendant.

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Judgment for the defendant.

GILLET against MASON.

IN ERROR, on *certiorari* from a justice's court.

Mason declared against *Gillet*, before the justice, in an action of *trespass*, for cutting down a tree containing a swarm of bees, and carrying away the bees and honey, which the plaintiff below had before found, and had marked the tree with the initials of his name.

Gillet pleaded the general issue; and there was a trial by jury.

Mason proved, that previous to bringing this suit, he had found a tree, containing a swarm of bees, standing on the land of *Timothy Gillet*, lately deceased, father of the defendant; that he marked the tree with the initials of his name, A. M.; that the defendant had cut down the tree, and taken and carried away the bees and honey; and that the tree contained a large

Bees are ferae naturae; and until hived and reclaimed, no property can be acquired in them. Finding a tree on the land of another, containing a swarm of bees, and marking the tree with the initials of the finder's name, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them; nor can

the finder maintain trespass against a person for cutting down the tree and carrying away the bees. (a)

(a) *Acc. Ferguson v. Miller*, 1 Cowen, 243, and see *Piersen v. Post*, 3 Caines's Rep. 175. *Buster v. Newkirk*, 20 Johns. Rep. 75. *Wallis v. Mease*, 3 Binn. 544.

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It was admitted by the plaintiff, that the land where the tree stood, belonged to *Timothy Gillet*; but it was denied that the defendant was his heir, or had any possession of the land. It was admitted that the defendant was a son of *Timothy Gillet*. The justice, in charging the jury, put the cause on the point, which of the parties first reclaimed the bees from a wild state; *and the jury found a verdict for the plaintiff below, for nine dollars.

Per Curiam. Bees are considered by Judge *Blackstone*, (2 *Com.* 392.) as *feræ naturæ*; but when hived and reclaimed, a qualified property may be acquired in them. Occupation of them, according to *Bracton*, that is, hiving or enclosing them, gives the property in *bees*. In the present case, it appears the bees were not hived before they were discovered by the defendant in error, and the only act he did was to mark the tree. The land was not his, nor was it in his possession. Marking the tree did not reclaim the bees, nor vest an exclusive right of property in the finder, especially in this case, against the plaintiff in error, who, as one of the children of *Timothy Gillet*, (who does not appear to have made a will,) must be considered as one of the heirs, and, as such, a tenant in common in the land. *Blackstone* (vol. 2. p. 393.) inclines to the opinion, that under the *Charter of the Forest*, allowing every free man to be entitled to the honey found within his woods, a qualified property may be had in bees, in consideration of the soil whereon they are found, or an ownership, *ratione soli*. According to the civil law, (*Just. Inst.* lib. 2. tit. 1. s. 14.) bees which swarm upon a tree are not private property, until actually hived; and he who first encloses them in a hive becomes their proprietor.

Judgment reversed.

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*M'NUTT against JOHNSON.

IN ERROR, on *certiorari* from a justice's court.

Johnson sued *M'Nutt* before the justice. The summons was returned personally served; and the defendant below not appearing, the plaintiff declared, that in *October*, 1807, *Nathan Reynolds* was brought before *John Cole*, Esq., a justice of the peace for *Montgomery* county, on a warrant to answer to the

In an action before a justice of the peace, where the cause is adjourned at the request of the defendant, and security is taken for the defendant's appearance at the time; such security must be by recognizance, taken by the justice, or a writing signed by the bail, otherwise the undertaking is within the statute of frauds, and the bail cannot be made liable.

plaintiff below, in a plea of trespass on the case, to his damage 25 dollars; that after joining issue before the justice, *Reynolds* demanded an adjournment of the cause, until the 3d of October, 1807, and offered *M Nutt* as bail, who became bail, and undertook that *Reynolds* should appear and stand trial, and on default thereof, undertook to pay the debt and costs. That *Reynolds* appeared; but before judgment was rendered, departed from the court and absconded from the county; that judgment was given in that suit for the plaintiff, for seven dollars, besides costs; that execution was issued and returned, that neither the goods nor the body of *Reynolds* were to be found; whereupon an action accrued, &c. &c.

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The plaintiff below produced a copy of the judgment under the hand and seal of Justice *Cole*, before whom the action against *Reynolds* was tried, setting forth the judgment in favor of the plaintiff below, against *Nathan Reynolds*, the issuing execution thereon, and the return by a constable, that neither the property of *R.* nor his body were to be found. The certificate of the judgment, under the hand and seal of the justice, was accompanied with a certificate, sealed by the clerk of the county, that *John Cole* was a justice of the peace at the time the judgment was rendered.

A witness testified that he was present at the trial between *the plaintiff below and *Nathan Reynolds*, and heard the defendant below say, that he was bail for *Reynolds*; that he should appear and stand trial on the day to which the cause was adjourned; and that *Reynolds* did appear, but departed the court before trial was determined. Upon this evidence, a judgment was given for the plaintiff below.

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Per Curiam. The judgment is erroneous. The defendant, not being present at the trial, cannot be deemed to have waived any objection to the competency of the proof; it ought, therefore, to have been legal. By the 7th section of the 25 dollar act, (24 sess. c. 165.) [2 R. S. 239. sec. 74.] to entitle the defendant to an adjournment, under the circumstances existing in the original case, the defendant is to give sufficient security to appear on the day, &c., and in default of such appearance, to pay the debt and costs, if judgment shall be given against such defendant. The particular kind of security is not designated; but it must be either a recognizance taken by the justice, or at least a written engagement; otherwise it comes directly within the statute of frauds; here there appears to have been neither.

Judgment reversed.

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BRUSH *against* TAGGART.

The contents of a *certiorari*, or other writ, cannot be proved by parol, but the original, or a [* 20] sworn copy of it must be produced. (a)

IN ERROR, on *certiorari* from a justice's court.

The suit below was an action of debt upon a judgment between the same parties, rendered before another justice.

The point relied upon by the plaintiff in error was, that he pleaded and gave in evidence, that a *certiorari* had been issued, allowed and served in the former cause; *and to prove it, he called two witnesses, one of whom stated that the defendant had obtained a *certiorari* on the judgment before Justice *Gorlay*, and that he had seen it; the other witness stated, that he had served it upon the justice; and upon being asked whether it was in a suit between the same parties, the question was objected to and overruled, on the ground that the contents of the *certiorari* could only be proved by the production of the writ, or of the justice on whom it was served.

Per Curiam. The decision below was correct. The contents of the writ of *certiorari* could not be proved by parol, so long as the writ itself, or a sworn copy of it, might have been produced. The case of *Edmonstone v. Plaisted* (4 *Esp. Rep.* 160.) shows the strict manner in which the contents of a process, or the existence of it, is to be proved.

Judgment affirmed.

(a) This principle applies to all records and office papers. But an exemplification or sworn copy is admissible, without accounting for the non-production of the original. *Jackson v. Robinson*, 5 *Wendell*, 442. *Vail v. Smith*, 4 *Cowen*, 71. *Hiltz v. Colvin*, 14 *Johns. Rep.* 182. But see *Foster v. Trull*, 12 *Johns. Rep.* 456. Contra, in the case of process, where the original must be accounted for. If parol proof is offered, it must be objected to at the trial, and cannot be assigned, afterwards, for error. *Van Slyck v. Taylor*, 9 *Johns. Rep.* 146.

RICE *against* KING.

IN ERROR, on *certiorari* from a justice's court.

In an action of *assumpsit* before a justice of the peace, for staves sold and delivered, the defendant pleaded

King sued *Rice* before the justice, in an action of *assumpsit*, for 1,000 hogshhead staves. *Rice* pleaded the general issue; and, afterwards, at the day adjourned for trial, he pleaded a

a former action of *trespass* brought by the same plaintiff for the same staves against the defendant, in which there was a verdict and judgment for the defendant. It was held, that the judgment in the action of *trespass* for the same goods, was a bar to an action of *assumpsit* for the same cause.

The same cause of action is where the same evidence will support both actions, though on different writs. (a)

(a) *Johnson v. Smith*, 8 *Johns. Rep.* 383. *Farrington v. Payne*, 15 *Johns. Rep.* 432. *Phillips v. Derick*, 16 *Johns. Rep.* 436. *Gardner v. Buckbee*, 3 *Cowen*, 120. *Coles v. Carter*, 6 *Cowen*, 691.

former trial and verdict in bar. The former trial was an action of trespass for the same staves, and a verdict was found for the defendant. The plaintiff admitted the truth of the plea; and proved, in support of his action, that the defendant acknowledged that he had taken a load of staves of the plaintiff, and that he would take the residue, and pay him. The defendant proved by a witness, who was a juror on the former trial, that they found a verdict for the defendant, because it did not appear that the plaintiff had any right to the staves. The justice charged the jury, that as the former action was trespass, and the plaintiff had not, in that case, recovered any thing for the staves, the judgment in that action was no bar; and they found, accordingly, for the plaintiff below.

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Per Curiam. The plea of a former verdict and judgment in the same cause was put in too late, had it been objected to; but no objection was made, and the plaintiff below admitted the fact of the former suit, but denied it to be a good bar, because that was an action of trespass, and this was an action upon the case. The justice charged the jury to the same effect. This charge, and the verdict in pursuance of it, were erroneous. What is meant by the same cause of action, is where the same evidence will support both the actions, although they happen to be grounded on different writs. The plaintiff below brought an action of trespass for the taking of these staves, and failed; and now he waves the *tort*, and brings *assumpsit* upon the same proof. It was shown that the former verdict was upon the merits of the claim, and upon the ground that the plaintiff had no right to the staves. If he had no right of action against the defendant for the taking of those staves, because he had no right of property, he had no right, without further and different proof, to the value of those staves. The case of *Kitchen v. Campbell* (3 Wils. 304.) is to this purpose; and the Court of C. B. there held, that as the plaintiffs had formerly brought trover for the goods in question, and had a verdict against them on the merits, it was a bar to an action of *assumpsit* for the same cause of action.

Judgment of reversal.

*BULL against HOPKINS.

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IN ERROR, on *certiorari* from a justice's court.

Hopkins sued *Bull* before the justice, and declared for money paid and laid out for the use of the defendant. The

In an action before a justice, a plea of a former action and trial between the same parties, in

which the present plaintiff set off his demand, is not good, if the money on which the demand was founded, was not then actually due; and the set-off, for that reason, rejected.

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defendant pleaded *non assumpsit*, and that the same demand had been pleaded, by way of *set-off*, to a suit brought by *Bull* against *Hopkins*. On the trial, the demand was proved by the admission of the defendant; and that the set-off had been exhibited at the former trial, and rejected by the jury. The justice, by a supplementary return, made under a rule of court, stated, that the payment of money by *Hopkins* for *Bull* was proved; that what *Hopkins* pleaded as a set-off at the former trial, was for a demand not then due, as the money was not paid until *after* such trial; and it was proved, that the set-off was disallowed for that reason.

Per Curiam. The justice, in his supplementary return, refers to, and adopts, as correct and true, the facts stated in the affidavit of *Hopkins*; and from those facts it appears, that the plaintiff's demand below accrued *subsequent* to the former trial; and arose from the payment of money for the defendant's use, which could not have been legally set off at the former trial, and so the former trial was no bar.(a)

Judgment affirmed.

(a) *Jefferson County Bank v. Chapman*, 19 *Johns. Rep.* 322. *Wolf v. Washburn*, 6 *Conen*, 261. But if a party to a suit, either plaintiff or defendant, present a demand which is legal and proper to be allowed, and the jury disallow it, such demand cannot be recovered in another suit. The error of the jury cannot be reviewed collaterally, though it may furnish a ground for a new trial, or reversal on *certiorari*. (*McGuinity v. Herrick*, 5 *Wendell*, 240. *Vid. Phinney v. Earle*, 9 *Johns. Rep.* 352.

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*ALLEN against HORTON.

Where A. sued B. in an action of *trespass*, and also in *assumpsit*, and the process in both suits was returnable at the same time and place, and the action of *trespass* was first called on, and issue joined, and the cause adjourned to a future day; and immediately after, the action of *assumpsit* was called on, and the defendant pleaded matter by way of *set-off* which was rejected by the justice, on the ground, that it ought to have been pleaded in the first suit; but it was afterwards allowed to be set off at the trial of the action of *trespass*. It was held, that the set-off ought to have been allowed in the action of *assumpsit*, and the judgment below was reversed.

IN ERROR, on *certiorari* from a justice's court.

Horton sued *Allen*, before the justice, in an action of *assumpsit*, and the defendant offered matter by way of set-off; but it was rejected, on the ground that it ought to have been set off in a former action of *trespass*, between the same parties.

This was the only point. The counsel submitted the return, with the affidavit annexed, to the court; and from them it appeared, that *Horton* sued *Allen* before the same justice in two actions; one in *trespass*, and the other in *assumpsit*; and in both suits the summons was returnable at the same time and place. The action of *trespass* was first brought on to trial, and issue joined, and then adjourned to a future day. Immediately after, the present cause came on, and the above set-off was rejected.

At the adjourned trial of the trespass cause, the set-off in question was allowed.

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v.
WILLIAMS

Per Curiam. The fact stated by the justice, that the set-off had been subsequently allowed in another action, cannot be taken notice of upon his return in this cause, because it was going out of the case. It was testimony not within the requisition of the *certiorari*, and for the truth of which the justice could not be responsible, in an action for a false return. The refusal of the set-off was wrong, because it was not strictly admissible in the former suit, which was trespass. For that reason, the judgment must be reversed.(a)

Juagment reversed.

(a) *Dean v. Allen*, 8 Johns R. 390. *Moore v. Davis*, 11 Johns. R. 144. *Dy-gerr v. Coppernoll*, 13 Johns. R. 210. A set-off is not allowable against uncertain damages, and where damages are not in their nature capable of set-off, they cannot be met by a set-off in an action for them. *Hepburn v. Hoag*, 6 Cowen, 613. Vid. 3 *Caines's R.* 34. 86.

*COBB against WILLIAMS.

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IN ERROR, on *certiorari* from a justice's court.

Williams brought an action against *Cobb*, before the justice, and declared on a note given him by the defendant, whereby he promised to pay to the plaintiff, 3,200 feet of boards, on or before the 1st of *March*, 1809, to be delivered at the mill of *Fuller & Cobb*. The defendant admitted the note, and pleaded that the boards were ready at the time and place, and still were ready. The defendant proved, that boards sufficient in quality and quantity were at the mill when the note was due, but the witness did not know to whom they belonged. It was proved, that at the time of the trial, the defendant had boards there sufficient. The justice gave judgment for the plaintiff, for the amount of the note.

In an action on a promise to deliver a quantity of boards, at a certain time and place, the defendant pleaded that he had the boards at the time and place, ready, &c., and it was proved, that boards of sufficient quantity and quality were at the place at the time, but the witness did not know to whom they belonged. It was held, that the plaintiff was entitled to recover.

Per Curiam. The defendant below put the cause upon the issue of a performance on his part, and he failed in proving it. Proving that boards were at the mill, without showing that they were his, was proving nothing; there was no other question raised at the trial, and the judgment must be affirmed.

Judgment affirmed.(a)

(a) See *Newton v. Galbraith*, 5 Johns. Rep. 119. *Barnes v. Graham*, 4 Cowen, 452.

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PEARSON
v.
PEARSON.

*PEASE *against* ALEXANDER.

IN ERROR, on *certiorari* from a justice's court.

In an action before a justice, on a promise of the defendant to pay the plaintiff a sum of money owing to the plaintiff by the son of the defendant, the only evidence was that the defendant had said he would pay the plaintiff the money his son owed the plaintiff; and no objection being made, the cause went to the jury, who found a verdict for the plaintiff. It was held, that the promise was void, for want of a consideration, and for not being in writing; and that the defendant had not waived his right to the benefit of

Alexander declared against *Pease*, before the justice, upon a promise to pay four dollars for his son *Thaddeus*. Upon the trial, by a jury, the plaintiff proved that the defendant had said several times, that he would pay the plaintiff the sum that his son owed to the plaintiff. This was all the proof; and no objection being made by either party why the cause should not go to the jury, they found a verdict for the plaintiff.

Per Curiam. Here was no valid contract proved. The defendant waived no right. The promise to pay the debt of another, was without any consideration averred or shown, and, therefore, void. It was also void for want of being in writing; and the defendant may, for aught that appears, have insisted upon the statute before the jury. The return only says, "that no further witness was produced by the parties." The case affords no ground for any inference by which we can support the legality of the demand.

Judgment reversed. (a)

(a) Vid. *Leonard v. Vredenburg*, 8 Johns. Rep. 29. *Farley v. Cleveland*, 4 Cowen, 432. *Cleveland v. Farley*, 9 Cowen, 639. *Jackson v. Rayner*, 12 Johns. Rep. 291. *Chapin v. Merrill*, 4 Wendell 657

the statute of frauds

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*PEARSON *against* PEARSON.

A gift is not consummate until the delivery of the thing promised; and until delivery, the party may revoke his promise. (a)

A parol promise to pay money, as a gift will not support an action.

THIS was an action of *assumpsit*. The cause was tried at the Ontario circuit, in June, 1808, before Mr. Justice *Spencer*. The plaintiff declared against the defendant, as maker of a promissory note, for 530 dollars, dated 9th December, 1805, payable 15 months after date. Plea, *non assumpsit*.

At the trial, the note was proved. A witness testified, that, a short time previous to the date of the note, a barn belonging to the plaintiff was burned, and it was generally reported in the neighborhood, that it had been set on fire by the defendant. On the 9th December, 1805, the plaintiff and the defendant were together, at the house of the witness, when the defendant asked the plaintiff to proceed to business, and the plaintiff replied, that "he did not know that they had any business."

(a) *Grangiac v. Arden*, 10 Johns. Rep. 293. *Cook v. Husted*, 12 Johns. Rep. 138. *Fink v. Cox*, 18 Johns. Rep. 145. *Wright v. Wright*, 1 Cowen, 598.

The defendant said, "You know we have agreed to settle, and I am to give my note." The plaintiff said, he did not wish the defendant to do so, if he was innocent. The defendant asked the plaintiff what was the amount of his loss; and was answered, "Twelve hundred dollars." The defendant said, "It was hard, for he was innocent;" and after some further conversation, the witness drew the note in question, which was subscribed by the defendant, but not delivered to the plaintiff. No other consideration was mentioned than what was stated by the witness. After the note was made, the plaintiff said, it was best to keep the transaction a secret; and, for that purpose, the note should remain with the witness, in whose hands it has ever since continued. The defendant told the plaintiff, it would be in the power of the plaintiff to do him an essential service, by publishing a recantation of the charge against the defendant, as to burning the barn, and that the plaintiff believed him innocent. *The plaintiff promised to make such a publication in the *Canandaigua Gazette*. About six months after the date of the note, the plaintiff not having made the publication, some conversation took place between him and the defendant, in which the plaintiff said he should not make the publication, not conceiving it to be his duty to do so; that he did not know that he had any note against the defendant, and if there was any note in the hands of the witness, he might deliver it up to the defendant.

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PEARSON.

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It was admitted, that a bill of indictment, on which the plaintiff's name appeared as a witness, had been found against the defendant, for burning the plaintiff's barn.

The defendant's counsel moved for a nonsuit, which was overruled by the judge, who told the jury that a voluntary note, though without consideration, was valid in law; that it was a vested gift, and that the defendant was under a legal obligation to pay it; and the jury, under the direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

Cady, for the defendant, contended, 1. That the note was without consideration, or that the consideration had failed; 2. That the note never was delivered to the plaintiff; 3. That it was extorted from the defendant, by taking an undue advantage of his situation; 4. That the declaration of the plaintiff to the witness, that he did not know that he had any note against the defendant, and that if there was any note in the hands of the witness, he might deliver it up to the defendant, amounted to a surrender of the note, and was a waiver of any right of action upon it; 5. That the judge misdirected the jury.

**Sedgwick*, contra, insisted, that the maker of a promissory note was not allowed to aver a want of consideration; (2 *Bl.*

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Comm. 445. 450. 2 *Ld. Raym.* 759. 4 *Mod.* 242. 2 *Barr* 1671. *Kyd*, 276. *Chitty*, 9. But see *Comyn on Contracts*, 9. 12. and 7 *Term Rep.* 350. n. a.) but that here the delivery of the note as a compensation for an injury was a sufficient consideration. (*Evans's Essay*, 151.) It cannot be said that the note is void, as given to stifle a prosecution for a felony; for there was no stipulation on the part of the plaintiff not to prosecute, or to withhold his evidence. (2 *Wils.* 341.)

Per Curiam. The validity of the note cannot be supported upon the ground taken at the trial, of its being a gift; for a gift is not consummate and perfect, until a delivery of the thing promised; and until then, the party may revoke his promise. A parol promise to pay money, as a gift, is no more a ground of action, than a promise to deliver a chattel, as a gift. It is the delivery which makes the gift valid. *Donatio perficitur possessione accipientis.* (*Noble v. Smith*, 2 *Johns. Rep.* 52.) The question then was upon the delivery and consideration of the note; for if there was no consideration for the note, it was a *nude pact*, and void as between the original parties to it. This is the true point in issue, and without giving any opinion upon it, to the prejudice of a future inquiry, a new trial is awarded, with costs to abide the event of the suit.

JACKSON, *ex dem.* FONDA and OGDEN, against TEELE.

An award, by the Onondaga commissioners, in favor of the grantor, in a deed, will ensure

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to the benefit of the grantee; it being in favor of the title; and the grantee, there being no dispute between him and the grantor, need not dissent. None but persons aggrieved need file a dissent. The act applies only to interfering and adverse claims. (a)

THIS was an ejectment for part of lot No. 78, in *Manlius*, in the county of *Onondaga*. The cause was tried before the chief justice, at the *Onondaga* circuit, the 12th of *September*, 1808.

*The plaintiff gave in evidence, an award of the *Onondaga* commissioners, dated the 11th of *December*, 1798, in favor of *Ogden*, one of the lessors. A dissent to this award, in behalf of *John Taylor*, was entered on the 11th of *November*, 1800. The plaintiff also gave in evidence, a deed from *Ogden* to *Fonda*, the other lessor, dated the 19th of *December*, 1806.

The defendant proved, that he was in possession of the premises, in 1793; and, notice having been given to the plaintiff to produce the deed, the defendant proved that, in 1796, or 1797, *Ogden* gave a deed of the lot to *Worthington Ely*, in fee, and that *Ely* gave his note for the purchase-money; that it was agreed between *Ogden* and *Ely*, that the former should go forward and substantiate his title to the lot, before the

(a) Where a grantor conveys with warranty, the deed will pass any title subsequently acquired by the grantor. *Jackson v. Matsdorf*, 11 *Johns. Rep.* 91. *Jackson v. Hubble*, 1 *Coven.* 613. *Jackson v. Winslow*, 9 *Coven.* 13. But see *Jackson v. Hoffman*, 3 *Coven.* 271.

commissioners, as *Ely* dare not appear in *Albany*, on account of debts, and that an award to *Ogden* would secure *Ely's* title. There was some dispute, afterwards, between *Ogden* and *Ely*, about the lot, and *Ogden* said, he had got *Ely's* deed, and that he kept it to coerce payment. He admitted that *Ely* had paid him 70 dollars. After the award, *Ogden* said that *Ely* should not have the land until he paid him; and that he thought it a good opportunity to save himself, as he had got *Ely's* deed. *Ely* left his deed with Mr. *Graham*, whom he employed as counsel. *Ogden* took the deed from the table before the commissioners, without the leave of Mr. *Graham*. After the award, *Ogden* told *Ely* the award was in his (*Ely's*) favor. *Ely* died in 1807. The defendant gave in evidence a deed, dated the 13th of *January*, 1800, from *Ely* to him, for 50 acres, part of the lot No. 78. A verdict was found for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

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v.
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Cady, for the plaintiff. The award of the commissioners is final and conclusive, as to the title of *Ogden*. *It is to be considered in the nature of a judgment, by which all parties are bound; and is not to be impeached in any way, or by any person, except in the manner prescribed by the statute, that is, by filing a *dissent*. In *December*, 1800, after the lapse of two years, the award was binding on all persons, who had not entered a *dissent*. The deed from *Ely* to *Teele*, given in *January*, 1800, ought not to have been received in evidence. The award is as conclusive as a judgment in a real action.

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Again, the possession of *Teele* was not adverse. He entered, in 1793, without title; and in 1796, he claimed to hold under *Ogden*.

Gold, contra. The legislature, by the 6th section of the act, (2 *Rev. Laws*, 266. sess. 20. c. 51.) contemplated only adverse claims. The commissioners had no jurisdiction in a case between a grantor and grantee, there being no dispute as to the deed. There can be no "interfering claims" between grantor and grantee; their rights are under one and the same claim. No grantee, however wary and vigilant, would ever think it necessary to enter a dissent to an award in favor of his grantor. The intendment is, as between grantor and grantee, that their rights, under the same claim, are not disputed. *Ogden* went forward as the agent of *Ely*. *Fonda* never pretended to make any claim, after the award.

[KENT, Ch. J. An award in favor of the grantor must enure to the benefit of the grantee.]

Again, *Teele* entered, in 1793, without claim or right. To whom, then, did his possession enure? To the right owner;

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that is, to *Ogden*, from whom *Teele* derives his title. So there is a conjunction of possession and right. A possession, not originally adverse, may become so, by a subsequent purchase. (2 *Caines's Rep.* 183.)

If a man makes a lease of land which is not his, and he afterwards purchase it, the lease will bind him, and he is estopped to say, the land was not his. (1 *Ld. Raym.* 729. 6 *Mod.* 258. *Wm. Jones*, 459. 1 *Johns. Cas.* 81.) *Ogden* cannot *set up any claim, under the award, against his deed to *Ely*.

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Cady, in reply, insisted, that, by the third section of the act. the award is "binding and conclusive against all persons," except those who enter their dissent within two years. If this is not to be the construction, then the awards of the commissioners are never conclusive; but may be inquired into in all cases. Even if an award was obtained by fraud, yet the party aggrieved by such award must enter his dissent.

Gold said, fraud was an exception in all cases; and cited 1 *Fonbl.* 322. *Doug.* 630. *Talbot*, 61. 3 *P. Wms.* 344.

Cady observed, that if a person, knowing a judgment or decree, purchases, though for a full value, such purchase is void. (*Devon v. Watts*, *Doug.* 88.)

Per Curiam. The award in favor of *Ogden*, the grantor, enured to the benefit of *Ely*, his grantee. It was an award in favor of that title. None but the party aggrieved was to dissent. The act, appointing the *Onondaga* commissioners, applied only to interfering and adverse claims. It did not apply to grantor and grantee, when there was no dispute between them. The act would work monstrous injustice, on the construction contended for on the part of the plaintiffs, that the award concluded even an innocent, unsuspecting grantee under the party who procured the award, as a shield to his original title. The award, even if considered as a newly acquired title in favor of *Ogden*, enured in favor of *Ely*; for *Ogden* cannot claim against his prior deed to *Ely*; and *Fonda*, to whom he sold, is equally precluded. (*Jackson v. Bull*, 1 *Johns. Cas.* 81.) And, at any rate, *the sale to him was void; for there was, at the time of the sale, a possession in the defendant, adverse to any existing title in *Ogden*. Judgment ought, therefore, to be rendered for the defendant.

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Judgment for the defendant. (a)

(a) See *Jackson, ex dem. Dunbar and others, v. Todd*, 6 *Johns. Rep.* 257.

BLACKLEY against SHELDON.

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Nov. 1810.BLACKLEY
v.
SHELDON.IN ERROR, on *certiorari* from a justice's court.

Sheldon brought an action of *trover* against *Blackley*, before a justice. The plaintiff declared for 50 bushels of wheat, in shock, taken and carried away by the defendant, and which *Sheldon* had levied on, as a constable, under an execution, &c. The defendant pleaded not guilty, and there was a trial by jury. The jury, having agreed on their verdict, returned into court and delivered the same in writing to the justice, by which they found for the defendant. The justice, without publishing their verdict, or making it known, informed the jury that, in his opinion, they had mistaken the evidence, and requested them to reconsider their verdict. The jury retired, and soon after requested to have a witness re-examined; and the witness was re-examined in the presence of both parties, and without objection by either. The jury then brought in a verdict in writing, in favor of the plaintiff, for 24 dollars and 42 cents, on which judgment was given by the justice.

On the trial, the plaintiff offered in evidence the execution by which the levy was made, and his return endorsed. This was objected to, but admitted. The levy of the execution was proved, and the taking of the wheat by the defendant. The execution was against a third person, and the wheat was lying in his field. A demand and refusal were also proved.

**Sherwood*, for the plaintiff in error, contended, 1. That the plaintiff should have produced the judgment and execution. He cited *Bull. N. P.* 91. 234. 3 *Esp. Cas.* 419. 5 *Burr.* 2631.

2. The justice was bound to give judgment on the verdict of the jury as first delivered, and could not send the jury out to reconsider it. 2 *Johns. Rep.* 182. 3 *Johns. Rep.* 430. 4 *Johns. Rep.* 414.

Hawkins, contra, cited 3 *Lev.* 20. *Salk.* 408. *Esp. Dig.* 414. 6 *Johns. Rep.* 68.

Per Curiam. Two objections are stated in this case to the judgment below: 1. The constable who sued for taking the goods upon which he had levied by virtue of an execution, produced the execution only, and not the judgment; 2. The justice sent back the jury to reconsider their verdict.

The first objection was overruled by the decision in the case of *Barber & Knapp v. Miller*, (6 *Johns. Rep.* 195.) in which it

The law as to trials by jury in other courts, applies to justices' courts.

After a verdict is pronounced in court by a jury, they may alter it before it is received and recorded.

After a verdict is received, the jurors may be examined by the poll, and either of the jurors may disagree to the verdict.

After a jury have retired to consider of their verdict, they may come back into court and hear evidence as to any matter of which they have doubts.

The court may also send a jury back to reconsider their ver-

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dict, before it is recorded, if there is a mistake. (a)

(a) Vid. *Henlow v. Leonard*, *infra*, 200. *Bunn v. Croul*, 10 *Johns. Rep.* 239. *Taylor v. Betsford*, 13 *Johns. Rep.* 487. *Fox v. Smith*, 3 *Cowen*, 23. *Benson v. Clark*, 1 *Cowen*, 258.

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was held, that if a constable sues a stranger, for taking goods which he had seized by virtue of an execution, the production of the execution, without the judgment, was sufficient to support his right of action.

The second objection requires more attention. The law is well settled, that before a verdict is recorded, the jury may vary from the first offer of their verdict, and the verdict which is recorded shall stand; and there are many cases in the books of a jury changing their verdict, immediately after they have pronounced it in open court, and before it was received and entered. (*Dyer*, 204. b. *Plowd.* 209. *Saunders v. Freeman. Co. Litt.* 227. b.) The verdict is not recognized as valid and final, until it be pronounced and recorded in open court; and it is reasonable that the jury should be enabled to avail themselves of the *locus penitentiæ*, and correct a verdict which they have mistaken, or about which, upon further reflection, they have doubt. (6 *Johns. Rep.* 68.) After the verdict is received, the jury may be examined by the *poll*, if the court please, and then either of the jurors may disagree to the verdict. (*Cro. Eliz.* 779.) So when the jury are retired, under the charge of the officer, they may come back into court to hear the evidence of a thing of which they are in doubt. (2 *Roll. Abr.* 676.) The law allows the jury all reasonable opportunity, before their verdict is put upon record and they are discharged, to discover and to declare the truth according to their judgment. The court may, also, of its own accord, send the jury back to reconsider their verdict, if it appears to be a mistaken one, and before it is received and recorded. We have an instance of this in 11 *Hen. IV.* 2. pl. 3. It was in a case of a writ of conspiracy against two, and the jury found one guilty and the other not guilty; and *Tirwit*, J., told the jury that their verdict was contradictory, and that if one be not guilty, the other was not guilty, in a charge of conspiracy; and that they had better reconsider their verdict; and the jury were accordingly taken back, and, afterwards, returned and found both guilty. This case was cited and approved of by the Court of C. B. in *Freeman's* case, in *Plowden*.

The only question is, whether this law is applicable to the trial by jury, in a justice's court. The act says, that "when the jurors have agreed on their verdict, they shall deliver the same to the justice in the same court, who is thereby required to give judgment thereupon." This leaves the law precisely the same as before; for the judgment is to be upon the verdict agreed to by the jury, which means their final and definite agreement; for they have the same right, and ought to have the same opportunity to correct a mistake, or to reconsider, that juries have in other courts, for the verdict is equally binding upon their consciences, and still more conclusive upon the parties.

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If the verdict be delivered in writing, as it was here, the justice had a right to permit the verdict to be taken by the poll; and the jury had a right to vary from their first finding. They had a right to retire and reconsider; and all that the justice did, in this case, was to request the jury to reconsider their verdict. They might have refused to reconsider, and have insisted upon adhering to their first verdict; but they consented to reconsider. It was their voluntary act, and one which they had a right to do. There was nothing then erroneous in the conduct of the justice. The verdict received and recorded was the only one to be regarded, and consequently the judgment below ought to be affirmed.

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M'INTYRE
v.
TRUMBULL.

Judgment affirmed.

M'INTYRE against TRUMBULL.

IN ERROR, on *certiorari* from a justice's court.

Trumbull sued *M'Intyre* before a justice. The plaintiff declared that *Stebbins*, the under-sheriff of *M'Intyre*, had taken more fees of the plaintiff, for collecting money on an execution, than he was by law entitled to, &c. The defendant pleaded the general issue. The cause was tried by a jury. Two witnesses were sworn for the plaintiff. Verdict for the plaintiff, for 10 dollars and 69 cents.

An action lies against a sheriff for the act of his deputy in taking more fees, on levying an execution, than are allowed by law; and whether the sheriff recognized the act of his deputy or not, need not be shown. (a)

Sedgwick, for the plaintiff in error.

Cady, contra, cited 6 *Bac. Abr.* 156. *Doug.* 40. 3 *Wils.* 399. 2 *Term Rep.* 148.

Per Curiam. There is nothing appearing upon the return of the justice, to enable the court to examine the merits of this case; and the only question is, whether, in any case, an action will lie against a sheriff for the act of his deputy, in taking or extorting more fees on execution than are allowed by law. On this point the law is too well settled to be now questioned. The sheriff is answerable *civiliter*, for the acts of his deputies; and it is no objection, that the act is of a criminal nature, for which the deputy might be answerable *criminaliter*. Whether it was shown that the sheriff had recognized the act of his deputy, does not appear. If such recognition was neces-

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(a) A sheriff is answerable *civiliter* for all acts of his deputy done *virtute officii*, but he cannot be rendered liable on a contract between the plaintiff and the deputy, by which the latter binds himself to acts or omissions not authorized or required by law. He is not answerable for the acts of his deputy unless they are performed in the ordinary line of his official duty. *Gorham v. Gale*, 7 *Cowen*, 739. *Vid. People v. Dunning*, 1 *Wend.* 16. 6 *Cowen*, 467. note (a).

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sary to be shown, we are to presume it was done in this case ; but the better opinion is, that it was not necessary. (*Sanderson v. Baker*, 2 *Black. Rep.* 832. *Ackworth v. Kempe*, *Doug.* 40. *Woodgate v. Knatchbull*, 2 *Term Rep.* 148.)

Judgment affirmed.

SCOUTON against EISLORD.

IN ERROR, on *certiorari* from a justice's court.

The debt of a person discharged under the insolvent act is due in conscience, and is a sufficient consideration for a new promise to pay the debt, (a) but a promise to pay the debt when the insolvent should be able without distressing his family, is a conditional promise, on which an action cannot be sustained, without showing that

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the defendant was able to pay without distressing his family.
(b)

Eislord brought an action of *assumpsit* against *Scouton*, before the justice. The plaintiff declared on a note of hand given by the defendant to the plaintiff on the 14th *April*, 1806, and for goods sold, &c. The defendant paid into court 25 cents for the goods sold, &c., and 62 cents for the costs; and as to the note, he pleaded a discharge under the insolvent act. The plaintiff then proved, that the defendant promised the plaintiff to pay him the note, "provided he could pay him without distressing his family;" and the defendant also said, in open court, that he would pay the note when he was able, without distressing his family, and added, that he would pay the plaintiff honestly. A judgment was given for the plaintiff on the note.

**Sedgwick*, for the plaintiff in error.

Cady, contra.

Per Curiam. The debt of an insolvent or bankrupt is due in conscience, notwithstanding his discharge. He may, therefore, revive the old debt by a new promise, and the old debt will be a sufficient consideration. This was so declared in the case of *Trueman v. Fenton*, (*Coup.* 544.) But the question here is, whether this was any thing more than a conditional promise, and whether it was not incumbent on the plaintiff to have shown that the defendant was of sufficient ability to pay without distressing his family. It has been repeatedly held, and seems now to be a settled principle, (2 *H. Black.* 126. *Besford v. Saunders*. 3 *Esp. N. P. Rep.* and 159. *Cole v. Saxby*. 4 *Esp. N. P. Rep.* and 36. *Davies v. Smith*.) that a

(a) *Shippey v. Henderson*, 14 *Johns. Rep.* 178. *Erwin v. Saunders*, 1 *Coven*, 249. *M'Nair v. Gilbert*. 3 *Wendell*, 344. But a subsequent promise does not restore the right to imprison the defendant, nor take away the effect of the discharge. *Conch v. Ash*, 5 *Coven*, 265. *Hubert v. Williams*, *Id.* 537. Nor can the transferee of a note take advantage of a subsequent promise to the payee. (*Deputy v. Swan*, 3 *Wendell*, 135. *Moore v. Viele*, 4 *Wendell*, 420. Vid. *Dean v. Hewitt*, 5 *Wendell*, 257.)

(b) *Bush v. Barnard*, 8 *Johns. Rep.* 407. And where a conditional promise forms the basis of a suit, the plaintiff should declare upon it as such, or at least set it forth in his replication. *Wait v. Morris*, 6 *Wendell*, 394.

promise to pay, when able, a debt barred by the statute of limitations, or by a certificate under the bankrupt law, was not an absolute but a conditional promise, and it lay with the plaintiff to prove the defendant able. This appears, in the case before us, to have been a conditional promise; and taken together and in connection what the defendant was proved to have said before the suit was brought, or what he is stated to have said upon the trial, he promised to pay the debt, provided only he could do it without distress. The justice ought, then, to have required proof of his ability to pay; it would be equally illegal and unjust to compel the defendant to pay without such proof.

There being no cause of action shown as to the promise upon the note, the judgment below ought to be reversed.

Judgment reversed.

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THE SAME *against* THE SAME.

THESE were actions on two open policies of insurance; one on the vessel, and the other on the cargo, of the brig called the *William Tell*, dated 16th December, 1807, "at and from New-York to St. Lucar." The policies contained the following written clauses: "Warranted *American* property; proof whereof, if required, to be made here only. In case of capture or detention, not to abandon in less than six months after advice thereof at this office, or until after condemnation. The insurers take no risk of a blockaded port; but if turned away, the assured to be at liberty to proceed to a port not blockaded; but not to be liable to loss by seizure or detention at the port of destination, nor in consequence of the captain, crew, or any part of them, being impressed or taken out of the vessel, nor for the effects of the embargo. Also warranted, that the importers of the cargo are not the exporters."

A vessel and cargo were insured from New-York to St. Lucar. The policies contained the following clause: "The insurers take no risk of a blockaded port; but if turned away, the assured to be at liberty to proceed to a port not blockaded."

The vessel sailed from New-York, the 23d December, 1807. On the 27th January, 1808, she was captured by

a British armed brig off Cape St. Mary's, on the coast of Portugal, about 70 or 80 miles from St. Lucar, and about 2 leagues from the shore; and was sent to Gibraltar, and condemned in the Vice-Admiralty Court there, as lawful prize, "for having violated the blockade of the ports of Cadiz and St. Lucar," &c.

It was held, that the clause in the policy extended to every loss happening by reason of a blockaded port, whether such blockade was a strictly legal blockade or not; and that the insurers were not liable.

Notice, either actual or constructive, of the existence of a blockade, is requisite, before a neutral can be deemed *in delicto*, or to have violated his neutral duty.

What constitutes a lawful blockade?

There was a blockade in fact of Cadiz and St. Lucar, in January, February and March, 1806.

It seems, that the accidental and temporary dispersion of a blockading squadron, by a storm, is not a suspension of the blockade, provided the fleet uses all due diligence to resume its station.

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On the 6th *July*, 1808, the plaintiffs abandoned for a total loss.

The cause was tried at the *New-York* sittings, on the 6th *June*, 1810, before Mr. Justice *Yates*. No objection was made to the preliminary proofs.

*The deposition of *Henry Jakeways*, the master of the *William Tell*, was read in evidence. He testified as follows: The vessel sailed on the voyage, the 23d *December*, 1807, with a cargo of provisions, tobacco and staves. On the 27th *January*, the brig was captured by the *British* armed brig, the *Imogene*, off *St. Mary's*, on the coast of *Portugal*, about 70 or 80 miles from *St. Lucar*, and about two leagues from the shore. Until the capture, the brig had met no vessel during her voyage. The master went on board of the *Imogene* with his papers, and the captain of the *Imogene* declared him good prize, and put three of the crew on board of a *British* lugger, passing for *Gibraltar*, and the prize was also put under charge of the lugger, to go to the fleet off *Cadiz*, for convoy to *Gibraltar*. At the time of the capture, the *British* fleet intended for the blockade of *Cadiz*, was from 90 to 100 miles off; and if the *William Tell* had proceeded to *St. Lucar*, they would not have approached but a few miles nearer the squadron, as the same was then blown on the coast of *Barbary*, and as the course of the *William Tell* to *St. Lucar* would have been nearly east.

The *William Tell* joined the blockading squadron, under the command of Admiral *Purvis*, on the coast of *Barbary*, about 9 leagues from *Cape Spartel*, and after remaining three or four days with the fleet, she was sent to *Gibraltar*, where she arrived the 9th *February*, 1808; and after performing quarantine for 10 days, the brig and cargo were labelled on the 22d *February*, and on the 7th *March*, were condemned in the Vice-Admiralty Court at *Gibraltar*, as good and lawful prize. The following parts of the captain's deposition, which were read, were objected to, but admitted by the judge.

"That on the trial of the *William Tell* in the Vice-Admiralty Court, the king's proctor read a letter which he said he had received a day or two before from Admiral *Purvis*, in which the admiral stated his opinion, that *neutral vessels bound to *St. Lucar* were liable to capture, and it ought to be presumed, that they intended to go to *Cadiz*, or words to that effect; and that the deponent applied for a copy of the said letter, which was refused."—"That before his vessel was condemned, the deponent was present in the Vice-Admiralty Court, at the trial of the brig *Calista* of *Boston* which, it was proved and admitted, sailed from *Alexandria* in the *United States*, for *St. Lucar*, and had there disposed of her cargo, consisting chiefly of flour and tobacco, and taken in a return cargo, and was returning to *Boston*, when she was captured, in *January*, 1808; and that the brig and her cargo were acquitted, and restored

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to the claimants, about three or four weeks before the condemnation of the *William Tell*."

The captain further deposed, that at the time of the capture, the port of *St. Lucar* was not considered as blockaded in fact; that, as he understood, *American* vessels freely entered and sailed from that port; that he saw or heard of no blockading force before *St. Lucar*; and he was informed, and always understood, that the blockade of *Cadiz* was principally, if not wholly, to keep in and watch the combined fleets there. That the place of rendezvous for the *Imogene* was at *Gibraltar*; that the *William Tell* was bound to *St. Lucar*, and to no other port. That while the deponent was at *Gibraltar*, he read a proclamation, issued by the governor of *Gibraltar*, dated the 10th *January*, 1808, giving notice, that the ports of *Spain* were blockaded, from *Cadiz* to *Carthage* inclusive; that the captain of the *Imogene* told him, that he captured the *William Tell* under the orders in council of 1805.

The deposition of *Thomas Holden*, mate of the *William Tell*, was also read; which contained substantially the same facts as were stated by the master. He stated, "that at the time of the capture, the *William Tell* was between 90 and 100 miles from the fleet off *Cadiz*; that *if they had proceeded to *St. Lucar*, they would have approached nearer the blockading squadron before *Cadiz*; but how near, or what distance *St. Lucar* is from *Cadiz*, he did not certainly know; that the deponent and three seamen proceeded in the lugger, in company with the *William Tell*, until they came up with the fleet off *Cadiz*, and the *William Tell* was there put in charge of some other vessel; that the deponent and the three seamen went in the lugger for *Gibraltar*, and soon after met with a violent storm, which drove them on the coast of *Morocco*; that a number of vessels were lost in the storm, and that the lugger did not reach *Gibraltar* until about 36 days after the capture of the *William Tell*; that he did not see or hear of any blockading squadron before *St. Lucar*, but that port was understood not to be blockaded; that *American* vessels freely entered and returned from *St. Lucar*, and among others, the ship *Connecticut*, which sailed from *New-York* a few days before the *William Tell*.

James Lovett, master of the ship *Connecticut*, was produced as a witness, and his testimony, though objected to, was admitted. He went into *Cadiz* in the *Connecticut*, in *September*, and came out in *October*, 1807, unmolested. He carried in a cargo of provisions. He saw the *British* fleet off *Cadiz* when he went in; and that *Cadiz* was considered as blockaded when he went in, while he was there, and when he left it. On coming out, in passing through the fleet, he was boarded, and asked what cargo he had carried in; and he answered, that he had carried in provisions, on which he was allowed to proceed. While he was at *Cadiz*, a number of *American* vessels were

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turned away, and several others, after being boarded, were permitted to pass. The blockade was not considered as excluding all commerce, but as being intended only to prevent the *French* and *Spanish* fleets from being supplied, which had returned after the battle of *Trafalgar*. That from the best information, *he was satisfied that *St. Lucar* was not blockaded at the time, nor so considered, while he was at *Cadiz*; and that immediately on his return to *New-York*, the *Connecticut* was despatched with a cargo of provisions for *St. Lucar*; that *St. Lucar* is ten leagues from *Cadiz*, by sea, and about six leagues by land; that being farther towards the head of the bay, it is more difficult to blockade than *Cadiz*, as it is more dangerous for large ships in winter; and when westerly winds prevail, the blockading squadron is obliged to keep to the southward for safety; that if *St. Lucar* was intended to be blockaded, it would be by the same squadron which invested *Cadiz*. During all the time he was in *Cadiz*, he saw the blockading squadron but twice; he thought the blockading squadron would not take cruising ground off *Cape St. Mary's*.

Jabez Lovett, a witness for the defendants, testified, that he sailed in the ship *Connecticut*, as master, from *New-York*, on the 22d *December*, 1807, for *St. Lucar*, where he arrived the 4th *February*, 1808; that he kept close in shore off *St. Mary's*, and so continued, that being the direct and usual course to *St. Lucar*. After he passed *Cape St. Mary's*, he saw two frigates in the same course. When he left *New-York*, he did not suppose *St. Lucar* blockaded; but on his arrival he found that both *St. Lucar* and *Cadiz* were considered as blockaded, and were so considered during his stay there, about two months; that he was told that the blockading squadron might be seen almost every day, though he saw it but twice. When he came out of *St. Lucar*, he saw the fleet to the southward and eastward, and supposed that they must have seen him, as he anchored in sight of the fleet, in a secure situation, until night, when the fleet usually keep off; he then came out, the night being dark, and the wind favorable, and escaped without being seen. That he took the bearings of the fleet from his mast-head, before night, and counted 29 sail.

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*A witness, who was at *Cadiz* in *January*, 1808, testified, that it was there universally understood, that both *St. Lucar* and *Cadiz* were blockaded. The same ships which invested *Cadiz* would be employed to blockade *St. Lucar*, if it was intended to be blockaded. While the witness was at *Cadiz*, innocent cargoes, not provisions, were sometimes allowed to pass, and some vessels were turned off. Small vessels were stationed off *St. Mary's*, more effectually to enforce the blockade; and they occasionally cruised to *St. Mary's*. By keeping close to the shore, it was easier to get into *St. Lucar* than into *Cadiz*, from *St. Mary's*; that he saw a gun-brig off *St. Mary's*, in *October* or *November*, 1807. *St. Lucar* is about 15 miles from

Cadiz, and cargoes landed there, are conveyed in boats, with convoy, to *Cadiz*, which was a reason for including both places in the blockade; that the blockade was more strictly enforced in *January* and *February*, 1808.

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The defendants then offered in evidence, a letter, dated the 8th *January*, 1808, from Mr. *Canning* to Mr. *Pinkney*, the *American* minister at *London*, which letter was contained in a pamphlet, printed at *Washington*, by *A. & G. Waite*, printers to Congress, in 1808; and which was entitled, "Message from the president of the *United States*, transmitting copies of all acts, decrees, &c. relating to the commercial rights of neutral nations since 1791, in pursuance of a resolution of the house, 11th *ultimo*, *December* 23d, 1808, read, and ordered to lie on the table." The letter and pamphlet being objected to, were rejected by the judge.

By the proceedings of the Vice-Admiralty Court at *Gibraltar*, it appeared that the *William Tell* and cargo were condemned for having "violated the blockade of the ports of *Cadiz* and *St. Lucar*, after the public notification thereof by the orders in council, and during the notorious existence of the same, *de facto*, by sailing to the port of *St. Lucar* with a cargo of provisions," &c.

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The judge charged the jury, that there was not an actual blockade of *St. Lucar*, at the time the *William Tell* was captured, as the blockading squadron appeared to be blown off towards *Cape Spartel*; and that the capture by the *Imogene* was wrongful, and a peril within the policy. That admitting that there was an actual blockade of *St. Lucar*, at the time of the capture; yet as the vessel ought first to have been turned away, the capture was illegal, and the defendants answerable for the loss, notwithstanding the clause in the policy; and he directed the jury to find for the plaintiffs, as for a total loss; and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial, which, by agreement, was argued by the counsel on both sides, upon paper. But the points discussed are so fully considered in the opinion delivered by the court, that it is considered unnecessary to state the arguments, which were voluminous.

Hopkins and *Emmet*, for the plaintiffs.

Wells, *Harison* and *Hoffman*, for the defendants.

KENT, Ch. J., delivered the opinion of the court. These causes were argued by the counsel upon paper, and as the questions which they involve are interesting, I have given the subject a very particular consideration.

The two principal questions are, 1. Was the capture, under the circumstances that attended it, a risk within the policy,

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admitting *St. Lucar* to have been a blockaded port? 2. Was *St. Lucar*, at the time of the capture, a blockaded port?

I have stated the points in this order; for if the first question be determined in favor of the plaintiffs, the examination of the second becomes unnecessary.

*1. The policy contains the following clause, viz. "The insurers take no risk of a blockaded port, but if turned away, the assured to be at liberty to proceed to a port not blockaded." This is a new provision in the contract, which has never, with us, received a judicial construction.

The judge, at the trial, told the jury, that admitting *St. Lucar* was blockaded, yet, inasmuch as the vessel ought to have been turned away, the capture was illegal, and the underwriters were answerable. This appears to me to be too confined a construction of the clause. If it applied only to lawful captures, founded upon an actual breach, or an attempt to break the blockade, it would be a provision in a great degree useless; for by the law, as it exists without the clause, the insurer is not responsible for a loss incurred by an actual breach of neutral duty, when the property is warranted neutral, unless the breach be such as to amount to barratry in the master. The words ought to be taken in a more enlarged sense. If the loss happens on account of the blockade of the port, no matter by what means, it was one of the risks which the insurers did not intend to assume, for they take "no risk of a blockaded port." The words are broad enough to include this case; and there seems to be no good reason why we should not give them their ordinary and popular meaning, especially, when that meaning coincides with the grammatical sense. The vessel was taken and condemned as and for a breach of blockade. Of this fact there can be no dispute. The sentence of condemnation is explicit, and the only question which can be made is, that the facts in the case did not warrant the sentence. But I think it is sufficient for the defendants to show, that the loss arose by reason of the blockade, in order to bring the case within the exception; and that under this special stipulation, we are not to inquire, whether the belligerent was strictly justifiable, in condemning the property for a violation of the blockade. (a) It is *sufficient, as between these parties, that the loss was incurred upon that account. If the insurer is to take "no risk," he must be discharged from *every risk*, arising from a blockaded port. Those risks may be numerous and difficult to define, of which the risk of being chargeable with a constructive notice of the blockade, and an intent to evade it, is perhaps not the least material. The risk may arise from illegal, as well as legal captures, founded on the fact of the blockade. An-

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(a) If the assured do any act which increases the risk of capture and detention according to the common practice of the belligerent, it will avoid the policy; it is not necessary that the act done would justify condemnation according to the law of nations *Livingston et al. v. Maryland Ins. Co.* 7 Oranch, 506.

other risk is the interruption of the voyage, by being turned away from the port ; and the policy makes special provision against the contingency of this risk ; and for that reason only was this particular risk mentioned ; it does not, therefore, control the generality of the preceding words. General words are to be understood in a general sense, if there be nothing in the contract which shows a clear intent to limit their meaning.

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The case of *Goix v. Knox* (1 *Johns. Cas.* 337.) is somewhat analogous. The policy there contained a special clause, that the insurance was to be "against all risks ;" and the court gave it a construction as broad as the terms, and extended the policy to all losses, except such only as might arise from the fraud of the insured. Words of similar import ought to receive the same construction, when they are inserted to restrain the policy for the benefit of the insurer, as when they are inserted to enlarge it for the benefit of the insured, provided they be not carried so far in the former case as to become repugnant to any valid insurance. An insurance is often made against particular risks, by name, to the exclusion of all others. We have an instance of this, in *Robinson v. The Ma. Ins. Co.* (2 *Johns. Rep.* 89.) and why should a policy, excluding all risks arising from a blockaded port, be deemed extraordinary ? We must collect the sense of the parties, from the language they have thought proper to use. We cannot go beyond the instrument to conjecture their motive and meaning. There may, however, *be very substantial reasons given for the comprehensive extent of the clause, and why the insurer would not take upon himself the arduous task of showing, in every instance, a sufficient cause for the capture. The breach of blockade is often a complicated fact, and it involves an inquiry into the knowledge and intent of the offending party, which may depend upon multifarious proof, and a critical examination of all the circumstances attending the captured vessel. From what appears in this case, the offence does not seem to have been made out ; for notice to the party of the existence of the blockade, by means of a previous notification to his country, or by notice to the individual, either actual or constructive, seems requisite, before the neuter can be deemed *in delicto*. (a) This principle is obviously just, and it is constantly recognized in the *English High Court of Admiralty*. (3 *Rob. Adm.* 328. 4 *Rob. Adm.* 80. 6 *Rob. Adm.* 66.) No such notice is shown in this case, and therefore, judging from what appears before us, I should deem the capture unlawful. I am aware, however, that we are not prepared to judge of its legality, for we have not the evidence before us, upon which the prize court proceeded ; and it would be unjust to arraign the sentence without being possessed of the testimony. If the knowledge of the blockade

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(a) If the insurance is "against all risks, blockaded ports and *Hispaniola* excepted," a vessel sailing ignorantly for a blockaded port, is covered by the policy. *Yeaton v. Fry*, 5 *Cranch*, 335.

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was brought home to the party, the condemnation was, undoubtedly, correct; and whether it was or not, could only be determined by the evidence at the trial, which consisted of "sundry examinations, taken in preparatory, in the cause, as also the several papers and documents found on board the brig, at the time of the capture, and delivered into the registry upon oath." The very fact of being caught, as this vessel was, close in to the Portuguese shore, and avowedly bound to *St. Lucar*, was ground, if not duly explained, from which to infer the intent; especially, if the vessel was studious to avoid attention, instead of going up to the cruiser, to inquire as to the condition *of the port. (a) The *destruction of papers* has been held to be, of itself, "evidence for condemnation," by the ordinances both of *France* and of the *United States*. This shows, from what delicate circumstances an inference of guilt may be drawn; and if the captain knew of the blockade, and meant to evade it, he had approximated sufficiently towards the scene of action, to render himself responsible. *Si in confiniis hostiumprehendantur, presumuntur hostibus advehi. Quæ enim proxima locis obsessisprehendantur, non alia ratione publicantur, quin quod ex facto tacite ad hostem commeandi propositum colligatur.* (*Bynk. Quest. J. Pub. b. 1. c. 11.*)

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On the first point, then, I am of opinion, that the charge to the jury was incorrect.

The counsel for the defendants seem to admit, that the actual existence of the blockade must be made out affirmatively by them. They are correct in this opinion; but the interest of the parties to the policy requires, that the clause in question should be liberally construed, as to the existence of a blockade, so long as the blockade was not a mere pretext, and the loss actually arose by reason of it. If the vessel had been turned away from the port by a cruiser, on the allegation of an existing blockade, and had been obliged to go to another port, the assured would not have deemed it just, to have been held to very great strictness of proof in making out the existence of a lawful blockade. The parties to such contracts have in view plain matters of fact, which address themselves to the senses, and affect the voyage, rather than difficult inquiries into the lawfulness of the causes which produce the exercise of power. What combination of facts will amount to a naval blockade, has been a subject of much dispute. It was a point in issue between *England* and the *Baltic confederacy*. The parties to the policy did not, probably, mean to involve themselves deeply in this inquiry. A blockade upon the most enlarged definition which has been allowed by any *of the authorities upon public law, and with adequate means to carry it into execution, would produce, as to the contract in question, all the effects and all the mischief of the most legitimate blockade. But whatever definition we may adopt, as being within

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(a) *Vid. Fitzsimmons v. Newport Ins. Co. 4 Cranch, 199.*

the meaning of the policy, is not a point material in this case; for the testimony proves the existence of a blockade in its strictest form. I shall now proceed to examine the facts with this view.

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2. The jury appear to have concurred instantly, and without leaving the bar, in the opinion of the judge, that the blockade of *St. Lucar* was not shown. But it appears to me, that the weight of evidence was decidedly the other way; and that it preponderates so strongly, that the verdict, for that cause alone, ought to be set aside.

The sentence of condemnation by the Court of Vice-Admiralty contains the express allegation, that *St. Lucar* was blockaded, not nominally, but *de facto*; and the vessel and cargo were condemned for an attempt to violate it. This sentence will be acknowledged to be presumptive, or *prima facie* evidence of the fact, and it stands as good proof until that presumption be destroyed. The testimony delivered at the trial appears to me to confirm it.

Jabez Lovett entered *St. Lucar*, on the 4th of *February*, 1808, which was only seven or eight days after the capture; and a fact attending his getting in, furnishes some light on the subject. He kept close in shore off *Cape St. Mary*; and after he had passed it, he continued so, when he saw two frigates in the same direction with himself, and he then altered his course. When he arrived at *St. Lucar*, he found that both that port and *Cadiz* were considered to be blockaded; and so continued to be considered for the two months that he staid there; and he was told that the blockading squadron might be seen almost every day. When he came out, he saw the fleet of 29 sail to the southward, and he escaped in the *night unnoticed. No proof can be stronger than this of a blockade, in fact, during the months of *February* and *March*, 1808, and it is carried back, in point of time, to within a few days of the capture. Who can know more certainly of the truth of the blockade than the inhabitants of the port who are the victims of it? *Richard Bailey* was at *Cadiz*, during the month of *January*, 1808, and only 15 miles from *St. Lucar*, and he says, it was then universally understood that both *Cadiz* and *St. Lucar* were blockaded, and that the same ships which blockaded *Cadiz* would be employed to blockade *St. Lucar*, if intended to be blockaded; that small vessels were stationed off *St. Mary's*, more effectually to enforce the blockade, and the cruising of small vessels occasionally extended there. That the blockade was more strictly enforced in the months of *January*, *February*, and *March*, 1808, and that the reason of including *St. Lucar* in the blockade was, that cargoes landed there were conveyed in boats, along shore, to *Cadiz*.

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These two witnesses, being upon the spot, spoke from what they saw, and from what was known at the places invested. Their testimony, therefore, is much stronger, and will weigh

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more in the scale of evidence, than that of many witnesses not present, and who testify only to a distant hearsay.

The letter of Mr. *Canning* to Mr. *Pinkney*, of the 8th of *January*, 1808, would have still further corroborated the proof of the blockade, as it was decisive evidence of the intention of the *English* government to include *St. Lucar* in the blockade of *Cadiz*, and to carry the blockade, at the entrances of those ports, into "the most rigorous" effect. This letter, I think, ought to have been admitted in evidence. It appears to have been printed at the city of *Washington*, by persons whom the defendants offered to show were printers to Congress, and to have composed part of a set of public documents transmitted to Congress, by the president of the *United States*. *A greater strictness of proof, in respect to such public matters of state, and when they are introduced collaterally, and not as matter of fact in issue, would be inconvenient, and is not now, in practice, required. Thus in the case of *The King v. Holt*, (5 *Tern Rep.* 436.) the *K. B.* held that the *London Gazette* was *prima facie* evidence of matters of state; and in *Talbot v. Seaman*, (1 *Cranch*, 38.) a *French* decree was allowed by the Supreme Court of the *United States* to be read, upon no higher proof than that which attended the letter in question.

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To prove the non-existence of the blockade, the plaintiffs relied on the depositions of the captain and mate of the captured vessel. The captain states, that when he was taken, off *Cape St. Mary*, and within two leagues of the shore, the *English* fleet, intended for the blockade of *Cadiz*, was blown off, and was upon the coast of *Barbary*, at the distance of 90 or 100 miles from *Cape St. Mary*. How he discovered that fact does not appear, otherwise than by the assertion, that when he joined the fleet in his captured brig, he found it there; but he does not tell us of the precise time at which he joined it, nor of the date of the storm which blew off the squadron, nor whether the whole fleet was carried off, so as to leave no cruisers behind. The fact of the dispersion of the fleet could not have been known to the *Imogene*, at the time of the capture; for he says that the prize was directed to the fleet "off *Cadiz*." If this momentary dispersion of the fleet, by a storm, is to be relied upon, as a suspension of the blockade, the captain ought not to have reposed on a general assertion, but he ought to have set forth dates, and all the circumstances, with the utmost precision. The deposition, as it stands, is to be read with jealous eyes; for, as was observed on another occasion, "masters have a direct interest to raise a blockade as soon as possible; therefore, their affidavits come with a dead weight about them, that very much *sinks their credit." The deposition of the mate directly contradicts the fact of the dispersion of the fleet. for he says, that he went in the lugger, in company with the *William Tell*, until they came up with the fleet, "before *Cadiz*;" and that the *William Tell* was then put in charge of

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some other vessel, and he "proceeded with the lugger for *Gibraltar*; and that soon *thereafter* they were overtaken by a violent storm, which drove them upon the coast of *Morocco*, in *Africa*." Both he and the captain say, that they did not know or hear of the blockade of *St. Lucar*. But as this is mere negative proof, and founded on hearsay abroad, it cannot be entitled to any consideration, in opposition to positive evidence of the blockade furnished by witnesses on the spot. And to show what little weight is due to such loose reports, the mate has incautiously mentioned, as an instance of the freedom of the port of *St. Lucar* from blockade, the very case of the *Connecticut*, which Captain *Lovett* commanded, and which, as we have seen, got in by chance, and at imminent hazard, on the 4th of *February*, 1808, and afterwards escaped from the port in the night, when a fleet of 29 sail were to be seen from the harbor.

This is all the material testimony on the question of the blockade; and, in my judgment, it establishes the fact beyond controversy.

That the naval force employed was competent, both from its amount and situation, to create the blockade of *St. Lucar*, cannot well be doubted, even if we resort to the most favorable definitions of a blockaded port. There was, at one time, twenty-nine sail counted. The squadron was in daily sight of the port. It had no other fleet within its enclosure to contend with, but the feeble remains of the action of *Trafalgar*. It had frigates and smaller vessels cruising quite up to the *Cape of St. Mary*; and every witness who speaks on the subject, proves, by the facts which he details, that it must have *been, at all times, hazardous to enter, against the consent of the blockading squadron. The only thing required by the convention of the *Baltic* powers, in the year 1780, to constitute a blockaded port, was, that there should actually be a number of enemy's ships stationed near enough to make an entry evidently dangerous; and the definition in the ordinance of Congress, in the year 1781, is to the same effect. And it is worthy of observation, that this ordinance makes it lawful to take and condemn all vessels of all nations "destined to any such port," without saying any thing of notice or proximity. (*Journals*, vol. 7. 186.) In the subsequent convention of the *Baltic* powers, in the year 1800, and which was signed by *Russia* and *Sweden*, in *December* of that year, the definition is to the same purpose. It is "where the disposition and number of the ships shall be such as to render it apparently hazardous to enter." When this is the case, they admit (art. 4.) an entry without notice, to be equal, in point of violation of neutrality, to an attempt to enter by force or artifice, after notice. (*N. A. Register*, for 1801, tit. *Public Papers*, 126.) I have the more readily alluded to these descriptions of a naval blockade, because the same definition was incorporated into the convention between *Great*

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Britain and Russia, in 1801, and the principle of that treaty has been declared by the Court of Errors, in the case of *Vos & Graves v. The United Ins. Company*, (2 Johns. Cas. 475.) to merit "high respect from all neutral powers." I ought, however, to observe, that the doctrine of blockade, as uniformly laid down by Sir *William Scott*, though accompanied, as it ought to be, with extreme sharp-sightedness as to cases of fraud, is much more just and liberal than the precedents which I have cited. Not one of those efforts to define or to check the abuse of the right of blockade, speak of the necessity of any previous notice. They seem to charge the neutral with constructive knowledge *of his duty and of his fault, arising out of the very existence of the blockade; and, upon their principles, the *William Tell* must have been rightfully condemned.

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But if the fact of the dispersion of the fleet by a storm had even been made out, (and this is the main circumstance on which the plaintiffs rely,) it would not have altered the case. Such an accidental removal of the fleet does not suspend the blockade, provided the fleet uses all due diligence to reassume its station. That such was the case here, cannot be doubted; for on the 4th of *February*, when Captain *Lovett* entered *St. Lucar*, he found two frigates on his track, and the port was then considered as blockaded, and the fleet was to be seen daily. If the neutral arrives before the port, when the blockading squadron is driven off, and he is ignorant of the cause of the removal of the force, he is not answerable for a breach of the blockade. I have no doubt of the solidity and justness of this principle. But if he knows, or is fairly chargeable with notice of the cause of the absence of the fleet, and that cause be an accidental dispersion by winds or storms, an attempt to take this opportunity to enter and to carry provisions to the besieged, would be a fraud upon belligerent rights, and a breach of blockade. It would be taking an unjustifiable part in the contest, which no candid neutral, bound to good faith, would advise, and which no belligerent power would tolerate. Though ignorance of the cause of the removal of the investing force will excuse the neutral, yet the blockade is still recognized by the law of nations as existing. This is said to be so laid down by all the writers who treat on the subject. *Hubner*, who

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carried as far as any writer the extension of neutral claims, admits, that the belligerent may use the most rigorous rights of war towards those who act with ill faith relative to besieged places; he says, that this ill faith must always exist in the *case of neutral vessels approaching a blockaded port; and he mentions, with apparent approbation, the case cited by *Grotius* from *Plutarch*, of the execution of the master of a vessel, who was taken carrying provisions to *Athens*, which was at that time besieged. (*De la saisie des bâtimens neutres*, tom. 1. p. 87. 115, 116.) If a storm drives a neutral, in spite of himself, within the confines of a blockaded port, he is excusable, and

would not be subject to forfeiture ; and is it not just that the same physical necessity, which would excuse the one, should not operate to the prejudice of the other ? Here the belligerent might say, *Hanc veniam damus petimusque vicissim.*

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The case of *Williams v. Smith*, (2 *Caines*, 1.) does in no respect deny or contradict this principle. The general language there used was applicable only, and so intended, to the fact before the court, of a blockade raised "in consequence of a naval expedition." Nothing was said by the court of the suspension of a blockade by a storm. The facts did not call for an opinion, or direct the attention of the court to that point ; and the distinguished counsel(a) who took the lead for the plaintiff in that cause, admitted, upon the argument, that if the position was abandoned by stress of weather, and there was a continual endeavor to return, the blockade was to be considered as existing in full force. This opinion I am free to cite as a great authority, for the author of it was a profound jurist, and as honest and able a statesman as any country ever produced ; and I well recollect that he contended, on that occasion, for the value of neutral rights, and for just limits to the pretensions of blockade, with such solidity of argument, such comprehension of principle, and such persuasive eloquence, as to command the tribute of admiration which was so uniformly due to his exalted endowments. In the case of **Vos & Graves v. The United Ins. Company*, already mentioned, the same point was incidentally noticed in the Court for the Correction of Errors ; but the court observed, "that it was unnecessary to give an opinion on the case of an actual attempt to enter a port during the interruption of the blockade, by reason of the blockading squadron being blown off." This express reservation in the opinion of the court shows, at least, that the point was not deemed clear in favor of the neutral pretension, if any such pretension was ever seriously asserted. And I am persuaded, that that high court of judicature (had its opinion been required) would not have laid down so lax a rule of moral conduct, as to justify a neutral in knowingly availing himself of the accidental dispersion of a blockading squadron by a tempest, to carry succors to a besieged port.(a)

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(a) The late General *Hamilton*.

(b) The following extract of a letter from Mr. *Marshall*, secretary of state, (now chief justice of the Supreme Court of the *United States*), to Mr. *King*, the American minister at *London*, dated September 20, 1799, shows the opinion of our government on this subject :—

"The right to confiscate vessels bound to a blockaded port, has been unreasonably extended to cases not coming within the rule, as heretofore adopted.

"On principle it might well be questioned, whether this rule can be applied to a place not completely invested by land as well as by sea. If we examine the principle on which is founded the right to intercept and confiscate supplies designed for a blockaded town, it will be difficult to resist the conviction, that its extension to towns invested by sea only, is an unjustifiable encroachment on the rights of neutrals. But it is not of this departure, which has received sanction from practice, that we mean to complain. It is, that ports, not effect

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*The blockade being established, the verdict in each cause is, in every point of view, against law and evidence, and ought to be set aside and a new trial awarded, with costs to abide the event of the suit.

New trial granted.(a)

(a) These causes were tried a second time on the 21st December, 1811, with the advantage of some additional evidence, at the sittings in *New-York*, before Mr. Justice *Van Ness*, when the jury again found for the plaintiff, on the ground that *St. Lucar* was not blockaded. The learned judge having instructed them that, if they doubted in regard to that fact, their verdict should be against the company. New trials were again awarded on the ground that the verdict was against evidence, and of a misdirection. *Vid. 9 Johns. Rep. 277.*

WATSON against THE MARINE INSURANCE COMPANY.

A vessel was insured from *New-York*, until she safely arrived at *Nantz*. The policy contained the following clause: "Warranted not to abandon in case of capture or detention, until six months after advice thereof, or until [* 58]

condemnation; also, free from seizure or detention in port, and not to abandon in consequence of being turned away, or for having been carried into any *British* port," &c.

The ship sailed from *New-York* the 24th December, 1808, and during the voyage was visited by two *British* cruisers, who endorsed her register, forbidding her to enter any port of *France*, &c.

Having met with a gale of wind, and being near *Belle-Ile*, she went there for a pilot, and

THIS was a policy of insurance on the ship *Two Marys*, "at and from *New-York*, until she should be safely arrived at *Nantz*." At the foot of the policy, which was dated December 10th, 1807, there was the following written clause: "Warranted by the assured *American* property, (proof whereof to be required here only,) and not to abandon, in case of capture or detention, until six months after advice thereof is received at this office, or until after condemnation; also free from seizure or detention in port, and not to abandon in consequence of being turned away, for having been carried into any *British* port, or going into any *British* *port, from any other cause. If turned away, leave given to go to another port not blockaded." The ship was valued at 10,000 dollars.

ually blockaded by a force capable of completely investing them, have yet been declared in a state of blockade, and vessels attempting to enter therein have been seized, and on that account confiscated.

"This is a relaxation proceeding directly from the government, and which may be carried, if not resisted, to a very injurious extent. Our merchants have greatly complained of it, with respect to *Cadiz* and the ports of *Holland*.

"If the effectiveness of the blockade be dispensed with, then every port of all the belligerent powers may, at all times, be declared in that state, and the commerce of neutrals be thereby subjected to universal capture. But if this principle be strictly adhered to, the capacity to blockade will be limited by the naval force of the belligerent, and of consequence, the mischief to neutral commerce cannot be very extensive. It is, therefore, of the last importance to neutrals, that this principle be maintained unimpaired.

"I observe that you have pressed this reasoning on the *British* minister, who replies, that an occasional absence of a fleet from a blockaded port ought not to change the state of the place.

"Whatever force this observation may be entitled to, where that occasional absence has been produced by accident, as a storm, which for a moment blows off the fleet, and forces it from its station, which station it immediately resumes; I am persuaded, that where a part of the fleet is applied, though only for a time, to other objects, or comes into port, the very principle requiring an effective blockade, which is that the mischief can then only be coextensive with the naval force of the belligerent, requires, that during such temporary absence, the commerce of neutrals to the place should be free."

The cause was tried at the *June* sittings, 1810, before Mr. Justice *Yates*. The preliminary proofs were admitted; and a verdict was taken for the plaintiff, by consent, for 15,000 dollars, subject to the opinion of the court, on the following case, with liberty to either party to turn the same into a special verdict.

The ship sailed from *New-York* the 25th *December*, 1807. On the 10th *January*, 1808, she was visited by two *British* ships of war, who endorsed her register, forbidding her to proceed to any port in *France*, or under its dependencies. After meeting with a heavy gale of wind, and cutting away some spars, she made for *Belle-Isle*, in order to take in a pilot, and was again boarded by an *English* schooner, but not showing her papers, the ship was permitted to proceed, and arrived off the shore of *Belle-Isle*, the 29th *January*, and took in a pilot, being about a league and a half from the principal fort. The ship being about 30 miles from *Nantz*, and the weather thick, so that she could not proceed, she lay to under the protection of the grand fort, for fear of being boarded again by *English* cruisers, having been chased by them, and two cruisers were laying to, off each end of the island. The ship lay to, for about an hour, almost within reach of *cannon shot, when she was boarded by an armed boat from the port of *Belle-Isle*, the officer of which being informed that the ship had been visited by the *English*, took command of the ship, and carried her within pistol shot of the fort, and there anchored her. The captain was then told by the commandant, of the *Milan* decree of the 17th *December*, 1807, and that the ship was good prize. The captain was prevented from returning to the ship, which was dismantled by the *French*.

The captain expended 6,348 livres, in travelling from one place to another, about the ship's business, and soliciting her restoration; which expense was necessarily incurred.

By permission of the council of prizes at *Paris*, the cargo was delivered to the consignees, upon their giving security to abide the event of the trial.

A part of the account of expenses, being the 12th charge of 705 livres, was incurred by the captain's going to *Belle-Isle*, to attend to the delivery of the cargo; but all the other charges in the account were for expenses incurred about the business of the ship only, and were, in the belief of the captain, who was a witness at the trial, necessary for the preservation of the ship, and in order to obtain her release. The vessel was con-

tain the release and restoration of the ship; which included wages of the captain, from the time he left the ship, until his arrival at *New-York*; his passage money, with commissions and interest; but the insurer on the ship is not liable for any expense specifically and exclusively for the benefit of the cargo, nor for any sum *per diem*, agreed by the owner to be allowed the captain while in port.

The insured may recover above the sum insured, for the expenses of labor and travel for the defence and recovery of the property insured; and where expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer on the ship, though the freight and cargo should be incidentally benefited, and ought to contribute in proportion; leaving the insurer on the ship to recover, if he can, of the owners or insurers of freight and cargo, for their contributory shares.

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was chased by a *British* cruiser, under the lee of the island; and having taken in a pilot, she lay to about an hour, about a league from shore, and distant about 30 miles from *Nantz*, the fog being so thick, that the ship could not safely proceed; and while in this situation, about a league and a half from the principal fort, and nearly in reach of cannon

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shot, the ship was taken possession of by a *French* armed boat, and carried in under the guns of the fort, and there claimed as a prize; and was afterwards condemned, under the *Milan* decree of the 17th *December*, 1808, for having been visited by a *British* cruiser.

It was held that this was not a seizure or detention in port, within the meaning of the clause in the policy, and that the insured were entitled to recover for a total loss, and also for the expenses of the captain, in endeavoring to obtain

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 Nov. 1810. having been visited by *English* cruisers; and the decree was
 executed on the 26th *March* following, until which time the
 master attended to the preservation of the ship, under the
 direction of the council of prizes. The captain's wages for
 the voyage were forty dollars a month; and by agreement
 with the owner, he was to be allowed one dollar for each day
 he remained in port.

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The account of the *expenses* of the captain, amounting to 2,469 dollars, exhibited by the plaintiff, included the expenses of travelling to and from *Paris* to *Nantz*, *L'Orient* and *Belle-Isle*, boarding and lodging at the different places, *wages* of the captain from the 26th *March*, *1809, to the 3d *August*, 1809, when he arrived in *New-York*; 526 dollars, being the amount of his allowance of one dollar a day, from 30th *January*, 1803, to 9th *July*, 1809; 200 dollars paid for his passage back to *New-York*, 1,105 livres left in the hands of the consignees, to prosecute an appeal to the council of state, and five *per cent.* commissions on the amount of these expenditures, with interest.

It was agreed, that if the court should be of opinion that the plaintiff was entitled to recover, a judgment was to be entered for the amount of the verdict, deducting any *items* in the account of the captain's expenses, which the court should be of opinion the plaintiff was not entitled to recover in this action.

This cause was argued on paper, by consent.

Wells, for the plaintiff.

Colden, for the defendants.

The points raised by the counsel for the defendants were,

1. That the vessel was seized in port, within the true intent and meaning of the policy.
2. That the stopping at *Belle-Isle* was a deviation.
3. That the amount of the account of expenses is incorrect; most of them are improperly charged against the insurers on the ship, being the subject of general average, and the freight and cargo ought to bear their proportions.

KENT, Ch. J., delivered the opinion of the court. The counsel for the defendants object to the recovery in this case, and contend,

1. That the vessel was seized in port within the true intent and meaning of the policy.

2. That stopping at *Belle-Isle* was a deviation.

- *3. That many of the *items* contained in the account annexed to the case, were not chargeable to the insurer upon the vessel, and that they were at least the subject of a general average,

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be chargeable upon the ship, freight and cargo, in due proportions.

The two first objections are without any plausible force. The ship was captured by a *French* armed boat, off the island of *Belle-Isle*, and thirty miles from the port of *Nantz*. The captain states that he went to *Belle-Isle* for a pilot, and was chased, under the lee of that island, by two *English* vessels; and that having taken a pilot on board, he lay to for an hour, about a league from shore, as the fog was so thick that he could not proceed. In this situation he was taken; and there does not appear to be any well-founded pretence for alleging that he was then *in port*, or that a delay of one hour was unnecessary, or amounted to a deviation.

With respect to some of the *items* in the account, the objection is well taken. The 12th charge of 705 livres, arose expressly on account of the cargo, and was not chargeable to the ship. That *item* ought, therefore, to be deducted. With respect to the rest of the charges, they may, perhaps, be considered as incurred equally for the benefit of the ship and freight; and the eleven first *items* arose before the captain ceased to have charge of the cargo, and were therefore incurred in laboring for the benefit of the cargo, as well as for the ship and freight. All these subjects of insurance were equally involved in the peril, and it would seem to be just that the ship and freight should bear these expenses in due proportions throughout; and that the cargo should bear its proportion of the first part of the expenses, until the captain ceased to have any further concern with it. But this nice and difficult question of apportionment need not be discussed in this case, for the captain declares generally, that these expenses were incurred about the business of the ship. The labor and expense were incurred *for the recovery of the ship, notwithstanding that other subjects might incidentally enjoy the result of the effort. The plaintiff was obliged to pay and bear the charges, as owner of the ship; and according to the decision in *Maggrath & Higgins v. Church*, (1 *Caines*, 215.) he is entitled, even if a case for contribution existed, to recover the whole of it, in the first instance, of the insurer upon the ship, and to leave it to him to call upon the owners or insurers of the cargo and freight, for their contributory shares. The decision on this point was afterwards considered by the court, in *Vandenheuvel v. The United Insurance Company*, (1 *Johns. Rep.* 412.) as a settled rule; and *Pothier*, in his *Traité du Contrat d'Assurance*, No. 52. and 164.) recognizes it as an established doctrine. There is no doubt that the insurer is liable beyond the sum insured, for the expenses of "labor and travel for, in, and about, the defence and recovery of the property insured;" (a) (1 *Caines*, 284. 450.) and

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(a) *Jemel & al. v. Marine Ins. Co.* infra, p. 424. *M. Brice v. Marine Ins. Co.* infra, 433. *Barker v. Phoenix Ins. Co.* 3 *Johns. Rep.* 307. *F.ancis v. Ocean Ins. Co.* 6 *Cowen*, 404.

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the captain proves in this case, that the expenditures, subject to the above exceptions, were necessarily incurred about the business of the ship, and of her only. The principal objection is to the last charge of 526 dollars, for the captain's port pay. Was this an expense incurred in travelling or laboring for the recovery of the ship? It was proved, that this was "an allowance by agreement with the plaintiff, of one dollar per day, for each day he remained in port." This is an *extra* allowance for discharging the cargo, and procuring freight, and attending to the interests of the owner, after the vessel has arrived in port; and it does not seem to come within the meaning of the allowance granted by the policy. The plaintiff might, by agreement, have allowed the captain 20 dollars a day, instead of 1 dollar, while he was in port; and ought the defendants to be responsible, beyond their subscription, for such extraordinary contracts? The clause in the policy ought to be confined to expenditures arising directly from a prosecution of the express objects for which it was introduced. The court are not informed by the case of any established rule or usage on this subject; and standing as the charge does, upon the naked fact of an allowance by agreement, without the particulars of that agreement being given, it ought not to form part of the recovery. The last charge and the 12th charge being deducted from the verdict, the plaintiff is entitled to judgment for the residue.

Judgment accordingly.

CASWELL, *qui tam*, &c., against ALLEN.

The act of the 3d of April, 1807, (sess. 30. c. 122.) directing the supervisors of the county of Cayuga to raise a certain sum by tax, for the purpose of building a fire-proof clerk's office, &c., is mandatory, and they are bound to execute it without delay; and the supervisors, who, at their annual meeting, in November,

1808, refused to raise money for that purpose, were held liable to an action for the penalty given by the act of the 20th of March, 1807, (sess. 30. c. 43.) for neglecting and refusing to levy and raise the money by tax.

THIS was an action of debt, brought against the defendant, as supervisor of the county of Cayuga, for neglecting and refusing to levy and raise, by tax on the freeholders and inhabitants of the county, a sum not exceeding 800 dollars, for the purpose of building a fire-proof clerk's office, near the courthouse, &c., pursuant to the directions of the act of the legislature, passed the 3d of April, 1807. (Sess. 30. c. 122.) The declaration contained three counts. The first count stated, that by an act of the legislature, passed the 20th of March, 1807, (sess. 30. c. 43.) entitled "An act more effectually to compel the supervisors of the towns, in the different counties in the state, to raise such sums of money as they are directed to raise and levy, by acts of the legislature," it was enacted, "that in all cases, where the supervisors in any county shall

be directed by law to raise moneys, for the erection of public buildings, or other purposes, and shall neglect or refuse to raise the sum, &c., every supervisor neglecting or refusing, &c. shall forfeit and pay the sum of 250 dollars, one moiety thereof to the use of the treasurer of the state, and the other moiety to the person who shall prosecute, &c. That by another act of the legislature, passed the 3d of *April*, 1807, (sess. 30. c. 122.) the supervisors of the county of *Cayuga* *were authorized and required to levy and raise a tax on the freeholders and inhabitants of the county, a sum not exceeding 800 dollars, &c. That the defendant, on the first *Tuesday* of *April*, 1808, was duly elected supervisor of the county of *Cayuga*, for the town of *Scipio*, to continue in office one year, or until another should be elected in his stead; and in eight days after, took and subscribed the oath required by law, in such case; and that the defendant continued as supervisor, performing the duties of such office, until the bringing of this action; that the supervisors, according to the act in such case made and provided, met, in *November*, 1808, and proceeded to examine, settle, and allow the accounts, chargeable against the county, and to ascertain what sum was necessary to be raised for the payment thereof; and the supervisors were then and there requested to levy and raise by tax, &c., a sum not exceeding 800 dollars, to be applied to building a fire-proof clerk's office, &c., and that the defendant, and the other supervisors, not regarding, &c., neglected and refused to levy and raise, &c., by which, &c.

The cause was tried at the *Cayuga* circuit, in *June*, 1809, before Mr. Justice *Van Ness*.

At the trial, it was proved, that the defendant met with the board of supervisors, in *November*, 1808, as supervisor of the town of *Scipio*, and the board were moved to raise the money to build the clerk's office; but the motion was lost, the defendant voting against it. The board of supervisors adjourned, not to meet again during that year. The act of the 3d of *April*, 1807, was not produced to the board; but the supervisors were informed of it. The majority, who voted against raising the money, said, that they did not know that the act empowered them to raise the money; and did not object on the ground that it had not been raised by the supervisors of 1807. It appeared, that in 1807 and *1808, about 6,000 dollars was raised in the county, about 5,000 dollars of which was for the purpose of erecting the court-house and gaol; no more money was raised in those years than to defray the contingent expenses of the county, and to erect the court-house and gaol. The aggregate amount of property in the county was estimated at about one million of dollars.

The judge was of opinion, that the supervisors had a discretion as to raising the money; and that the plaintiff, before he could be entitled to recover, must show that they had abused

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that discretion, or exercised it corruptly; and no further evidence being offered, the plaintiff was nonsuited.

A motion was made to set aside the nonsuit.

Hildreth and Troup, for the plaintiff, contended, that the act of the 3d of *April*, 1807, was mandatory on the supervisors, who had no discretion, but were bound to obey the requisition of the legislature. The legislature having decided that it was proper to raise the money, for the purpose designated, nothing remained for the supervisors but to execute the intention of the act. It cannot be supposed that the legislature would pass such an act, and leave it to the pleasure of the supervisors, whether it should ever be carried into effect or not. No time was fixed within which the money was to be raised. It was, therefore, to be raised immediately, or with all convenient speed. The only discretion which the supervisors could exercise, was as to the amount to be raised; whether the whole 800 dollars, or only a part of it, and as to the apportionment of the tax among the individuals.

E. Williams, contra. This is an action for a penalty, for a breach of public duty; and the party is held to strict proof, in order to support his action. The act was passed in 1807, and was mandatory, if at all, on the supervisors then in office. The defendant was not then *a supervisor. But what is the breach of duty? The supervisors, in 1807 and 1808, raised above 6,000 dollars. The penalty in the act is for the not raising the money; it is for that the action is brought; not for not applying the money, when raised, to the erection of a fire-proof clerk's office. It is not averred in the declaration that the money raised was not so applied.

Again, it is said, the money was to be raised immediately. But the office was to be erected near the court-house. Now the court-house was not erected, nor its site fixed; and by the act of the 6th of *April*, 1808, (sess. 31. c. 149.) the building erected was not to be recognized as a court-house, until the commissioners should purchase, and cause to be conveyed to the supervisors, at least one acre of land, on which the building was to be erected. There was not, then, a court-house, when these supervisors held their meeting, near which a clerk's office could be erected.

Again, this was a private act; and there is no evidence that it was ever shown or produced to the supervisors, who were not bound to take notice of it, at their peril.

There was certainly a discretion in the supervisors, to raise the whole or a part of the sum of 800 dollars; and they must also have a discretion, as to the time in which it was to be raised, provided it be done in a reasonable time.

YATES, J., delivered the opinion of the court. The only

question in this cause is, whether the supervisors of the county of *Cayuga* had a discretion as to the raising of this money; or whether the act is mandatory, and obliged them to do it without delay.

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By the act of the 20th of *March*, 1807, entitled, an act more effectually to compel the supervisors of the towns, in the different counties of this state, to raise such sums of money as they are directed to raise and levy, by acts of the legislature, it is enacted, that in all cases, when *the supervisors of any county in this state have, or shall be directed by law, to raise moneys for the erection of public buildings, or other purposes, and shall neglect or refuse to raise the sum so required to be raised, in the manner so directed by any act or acts of the legislature, every supervisor so neglecting or refusing to conform to the directions of any law passed, or to be passed, for the purposes aforesaid, shall forfeit and pay the sum of 250 dollars; the one moiety whereof, when recovered, shall be put into the hands of the treasurer of this state, and the other moiety shall go to the benefit of the person who shall prosecute the same to effect.

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This law was passed to prevent a growing evil. Many instances had occurred, of supervisors not only neglecting, but absolutely refusing to comply with acts of the legislature, by which they were directed to raise money for public purposes, and, by such neglect, impeded the progress of measures evidently beneficial to the community. Although required for public convenience, yet, owing to local prejudices and disputes, these measures could not be forwarded. The statute, therefore, to prevent this evil, subjected the persons, by whose means the benefits intended by those laws were prevented, to the penalty stated in the act.

The law of the 3d of *April* is sufficiently explicit to convey the meaning of the legislature. It is there enacted, "that it shall be the duty of the supervisors of the county of *Cayuga*, to levy and raise, by tax, on the freeholders and inhabitants of the said county, a sum not exceeding 800 dollars; and to apply the same money, so to be raised, in building a fire-proof clerk's office, at or near the court-house, when the same is erected, under the direction of the said supervisors, by their superintendents, to be by the said supervisors appointed for that purpose," &c.

*This act is mandatory. No discretion appears to be given to the supervisors; they were obliged, forthwith, to raise and levy the tax, as directed; and the supervisors, who, by their votes prevented a compliance with the statute, have rendered themselves liable for the penalty mentioned in the law of the 20th of *March*, 1807.

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It was suggested, in argument, that it was the duty of the

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board of supervisors, of the year 1807, exclusively; and that they, only, were liable to the penalties of the statute. Such reasoning cannot be correct. Their neglect could not destroy the further operation of the statute, as to all future boards. It became their duty also; and such of the supervisors as neglected or refused to comply with the directions of the statute, are equally liable to its penalty. The duty and responsibility is the same in both cases.

According to the strict construction of this law, which must be the rule here, it being a penal statute, I cannot discover that a discretion, authorizing a delay, can possibly have been intended by the legislature. It is alleged, that the court-house not being established, made it unnecessary, and consequently improper. And in order to show that the site for the court house had not been located, the 4th section of the act of the 6th of *April*, 1808, authorizing commissioners to fix the place has been cited.

But admitting that, to give operation to the statute of the 3d of *April*, the establishing of the court-house was first necessary, and that it was incumbent on the plaintiff to show that an acre of land around the building had been conveyed to the supervisors of the county, this did not come in question on the trial.

The judge laid down a rule of law, which the plaintiff's counsel were bound to respect; and the refusal to give further evidence admits, that they solely relied on the defendant's refusing to vote for raising the money; *and this declining to give further evidence cannot be considered as an admission, that evidence as to the conveyance did not exist.

An attempt was made to show that the money raised in 1807 and 1808, was virtually a compliance with the directions of the act; but when it appears, by the evidence, that the sums raised in both those years were not more than sufficient to defray the contingent charges of the county, and the amount requisite for the court-house, it cannot operate as an excuse; more especially, as it cannot be denied that the question, as to raising the money, for the special purpose of erecting a fire-proof office, had been put to the board of the supervisors, and was negatived by a majority, in which vote the defendant concurred. The suggestion, that the board of supervisors had received no official notice of the law, cannot exculpate them. It is not reasonable to suppose that they were ignorant of the existence of this law, upwards of 18 months after it had passed: nor could such a fact, allowing it to have existed, remove their liability. They were, however, informed of the law, by the member who introduced the subject, and made the motion to raise the sum directed by the statute, in the board of supervisors; on which motion the part taken by the defendant, as

before stated, rendered him liable, as one of the supervisors, for preventing the measure.

The nonsuit, therefore, ought to be set aside, and a new trial granted.

Rule granted

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LOSEE
v.
DUNKIN.

*LOSEE against DUNKIN.

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IN ERROR, from the Court of Common Pleas of Dutchess county.

The suit below was an action of *assumpsit* on a promissory note given by the defendant to *David Newton*, payable, on demand, to *Newton*, or bearer, for the sum of 55 dollars, with interest, and dated the 16th day of *January*, 1805. An assignment in writing from *Newton* to the plaintiff, dated *April* 3, 1805, was endorsed on the note. The declaration was in the usual form, on the note. Plea, *non assumpsit*.

The defendant proved, that shortly after the date of the assignment, he paid *Newton* 50 dollars, which he agreed to credit on the note.

The plaintiff's counsel contended, that this evidence was inadmissible, on the issue of *non assumpsit*; but the court ruled, that it should be admitted; and the jury found a verdict for the plaintiff for six dollars and seventy-five cents; and judgment was given for the plaintiff for that sum, and for the defendant, for the costs.

The case was submitted to the court without argument.

Per Curiam. The note was payable on demand, and negotiated upwards of two months and a half after it was given. The first question that naturally arises is, whether this is to be considered as a note negotiated after it was due, so as to let in the defence. There is no precise time at which such a note is to be deemed dishonored. In *Furman v. Haskin*, (2 *Caines*, 369.) a note payable on demand, and negotiated eighteen months after it was given, was considered as a note out of time, so as to subject the endorsee to the matter of defence existing when it was endorsed. On the other hand, in *Hendricks v. Judah*, (1 *Johns. Rep.* 319.) the note was payable on

Where a note payable on demand, was negotiated two months and a half after its date; in a suit by the holder against the maker he was allowed to show payment to the original payee, before the transfer of the note to the plaintiff.

There is no precise time at which such a note is to be deemed dishonored; but it must depend on the circumstances of the case, and the situation of the parties.

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(a) Vid. *Loomis v. Pulver*, 9 *Johns. Rep.* 244, where the notes were negotiated two years after date, and were held out of time. In *Sanford v. Nickles*, 4 *Johns. Rep.* 224, the maker was not permitted to avail himself of any defence against the payee at the expiration of five months after the note became due, to affect the endorsee, except so far as payments were endorsed on the note. But five months is an unreasonable delay in demanding payment of the maker, and giving notice of dishonor to the endorser of a note payable on demand, where the parties live in the same city. See *v. Cunningham*, 1 *Cowen*, 397. Vid. *Bank of Utica v. Smedes*, 3 *Cowen*, 662. *Aymar v. Beers*, 7 *Cowen*, 705.

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demand, and drawn in *England*, and was put in suit in this state by the endorsee within a year from its date, and the court said that the maker was not entitled, in that case, to a set-off of demands against the payee, without proof of a fraudulent assignment, for it was to be presumed that the note was assigned soon after its date. The demand must be made in reasonable time, and that will depend upon the circumstances of the case, and the situation of the parties. There are no particulars peculiar to this case disclosed; and the court cannot say that it was erroneous to let in the defence; for the circumstances of this case might have been such as to justify the conclusion that the note was dishonored when it was assigned.

Assuming this to have been the case, there is no doubt but that the defendant might give in evidence, under the general issue, payment to the original payee before the endorsement. (*Brown v. Davis*, 3 Term Rep. 80. *Brown v. Cornish*, 1 Ld. Raym. 217.) If the payment was in full discharge of the note, it would go in bar of the suit; and if it was not a payment in full, it will go only in mitigation of damages.

The judgment below must, therefore, be affirmed.

Judgment affirmed.

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*SLOSSON against BEADLE.

Where A., in consideration of 500 dollars, paid in full, for 50 acres of land, covenanted to convey the land to B. by a good and sufficient deed, on or before a certain day, or in lieu thereof to pay him 800 dollars; it was held, that B. was entitled to recover on a breach of the covenant, the 800 dollars, with interest; the same being in the nature of liquidated damages, and not a penalty.

THIS was an action of covenant, brought on an agreement, by which the defendant, on the 1st of *August*, 1807, in consideration of 500 dollars, received in full for 50 acres of land, covenanted and agreed with the plaintiff, by a good warranty deed, on or before the 1st of *August*, then next, to convey the 50 acres of land, or in lieu thereof, to pay the plaintiff 800 dollars, &c.

At the *Cayuga* circuit, a verdict was taken for the plaintiff, by consent, for 913 dollars and 16 cents, subject to the opinion of the court, whether the plaintiff was entitled to recover the 800 dollars, or only the 500 dollars, with interest.

The case was submitted to the court without argument.

Per Curiam. The 800 dollars were evidently intended to be liquidated damages, and were not inserted as a penalty. The defendant had received the consideration of 500 dollars; and at the end of the year he was to convey, or in lieu thereof, pay the 800 dollars. This was an alternative reserved for his election.

The verdict ought, therefore, to stand, and judgment to be rendered for the plaintiff.

Judgment for the plaintiff. (a).

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THE PEOPLE
v.
LEWIS

(a) Vid. *Dennis v. Cummins*, 3 Johns. C. 297. *Hasbrouck v. Tappen*, 15 Johns. R. 200. *Gray v. Crosby*, 18 Johns. R. 219. *Smith v. Smith*, 4 Wendell, 468. 5 Cowen, 150, note (b). *Taylor v. Sandiford*, 7 Wheat. 13.

*THE PEOPLE against LEWIS.

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THIS was an action of *assumpsit*, brought against the defendant, as late governor of the state of *New-York*. The declaration contained a count for money had and received, &c., and the usual money counts. Plea, *non assumpsit*.

The defendant, being governor of the state from *July*, 1804, to *July*, 1807, was authorized, by an act of 1804, and by an act of each subsequent year, to draw from the treasury, a sum not exceeding 750 dollars, in each year, to defray the *incidental expenses* which might arise in and about administering the government of the state. [Vid. 1 R. S. 192. s. 14.]

By virtue of those laws, the comptroller, on the order of the defendant, drew warrants on the treasurer, which were paid, to the amount of 2,272 dollars, of which sum 41 dollars and 11 cents was charged to the fund for defraying expenses of the *Indians* visiting the seat of government.

After the defendant ceased to be governor, he was called on by the comptroller, to account for the 2,272 dollars; and he exhibited an account of *items* of expenditure, including the 41 dollars and 11 cents, amounting to that sum. The comptroller refused to allow several *items* of the account, amounting to 1,246 dollars and 39 cents, and to recover which the present suit was brought. The *items* consisted chiefly of expenses of reviewing the militia of the state, blank commissions, travelling expenses on public business, &c.

A case, containing the above facts, was submitted to the court without argument; and it was agreed, that if the court should be of opinion that the plaintiffs were entitled to recover, a judgment should be entered for such sum as the court should direct.

**Per Curiam*. The moneys for which the defendant was called upon to account, were received by him under several acts of the legislature, appropriating certain sums to defray the incidental charges arising in and about administering the government of the state. The defendant having been called upon by the comptroller to account for the expenditure of the

By several acts of the legislature, from 1804 to 1807, the governor of the state was authorized to draw from the treasury a sum not exceeding 750 dollars, in each year, to defray the *incidental expenses*, in administering the government of the state; and the governor, having received the sums there appropriated, exhibited his account of his expenditures, equal to the amount received; it was held, that the propriety of the *items* charged for these *incidental expenses* was not a subject of judicial cognizance; but was necessarily left to the discretion of the executive, under the control of the legislature, and that the governor was not liable to an action, at the suit of the

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people, to recover back any part of the money so received and expended, on the ground of its having been improperly expended.

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money, he complied with the request; but some of the *items* in the account, being, in the opinion of the comptroller, not allowable, the present suit was instituted; and we are called upon, in the first place, to decide whether it can be sustained. We are satisfied, that upon the facts stated in the case, it cannot. The specific objects for which the moneys put into the defendant's hands were to be applied, are not designated. What are to be deemed incidental charges, arising in and about administering the government, are no where in our laws defined. The appropriation of the money must, therefore, necessarily be left to the discretion of the executive, under the control only of the legislature. There is no rule of law, by which the comptroller could, or by which this court can, test the correctness of the application of the money. The defendant accounts for the money, as having been expended in and about administering the government. And the propriety of the charges, we think, is not a subject of judicial cognizance. It was an appropriation, resting entirely in legislative discretion.

Judgment for the defendant.

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*FRARY *against* DAKIN.

If an insolvent who has obtained his discharge under the insolvent act, undertakes to plead specially, and to state all the proceedings in relation to his discharge, he must state a conformity, in every respect, to the directions of the act; and if he does not state the facts correctly, and especially if he omits to state, that at least *three fourths* of his creditors in amount, subscribed to his petition, &c., so as to give the judge jurisdiction, the plea is bad. (a)

IN ERROR, from the Mayor's Court of the city of Hudson. *Dakin* brought an action of *assumpsit* against *Frary*, in the court below, for work and labor, &c. *Frary* pleaded, 1. *Non assumpsit*; 2. His discharge under the insolvent act, "that, on the 20th *October*, 1804, he personally appeared before *James Kent*, Esq., Chief Justice, and delivered to him, according to the act entitled, "An act for giving relief in cases of insolvency," an account, inventory and petition, with an affidavit thereunto annexed, whereupon the said justice did administer the oath prescribed by the said act to be taken by insolvent debtors; and appointed the 18th *December* ensuing, at, &c., as the time and place when and where the creditors of the said *Asa Frary* should be notified to show cause why an assignment of the said *Asa Frary's* estate should not be made, and he be discharged, according to the directions of the said act; and the said chief justice being satisfied that the said *Asa Frary* was

(a) If a plea of a discharge under an insolvent act state enough to give the magistrate who granted it jurisdiction, and set forth the discharge itself, it will be sufficient. *Cantillon v. Graves*, 8 *Johns. R.* 472. *Hines v. Ballard*, 11 *Johns. R.* 491. *Morgan v. Dyer*, 10 *Johns. R.* 161. *Rooserell v. Kellogg*, 20 *Johns. R.* 208; and see *Wyman v. Mitchell*, 1 *Cowen*, 316. *Wheeler v. Townsend*, 3 *Wendell*, 247. *Porter v. Miller*, *Id.* 329. *Cleveland v. Rogers*, 6 *Wendell*, 438. It is a general rule, in pleading the proceedings of an inferior jurisdiction, that the facts necessary to give it jurisdiction must be set forth, and then the pleader may say, *tautier processu a fuit*. *Dakin v. Hudson*, 6 *Cowen*, 221.

justly and truly indebted to the subscribing petitioning creditors, in the sum by them mentioned, and the said sums amounting, in the aggregate, to three fourths of all the debts of the said *Asa Frary*, and the said *Asa* having conformed in all things to those matters required of him, according to the true intent and meaning of the said act: Whereupon, the said chief justice, on the 18th day of *December*, 1804, directed an assignment of all the estate of the said *Asa Frary*, both in law and equity, in possession, reversion or remainder, to be made by him to *Noah Gridley*, the person nominated by the petitioning creditors, excepting the articles of bedding and wearing apparel, described, &c. And afterwards, on the said 18th *December*, the said *Asa* executed, under *his hand and seal, and delivered, in the presence of the said chief justice, a grant or assignment, by which he granted, &c. &c. Whereupon, the said chief justice, by virtue of the power vested in him by the act aforesaid, and in pursuance thereof, did, then and there, to wit, at, &c., by a discharge under his hand and seal, bearing date, &c., which discharge, &c., is now here shown, &c., "discharge the said *Asa Frary* from all such debts as were due by him at the time of the assignment by him made as aforesaid, though contracted before that time, and payable afterwards, &c. By reason whereof," &c. To this plea there was a general demurrer and joinder, on which the court below gave judgment for the plaintiff. The issue was also tried, and found for the plaintiff, on which judgment was also rendered.

The question was as to the validity of the second plea. The plaintiff in error stated several objections.

1. That the plea does not state that three fourths of the creditors in value, subscribed the petition in conjunction with the insolvent, and made the affidavit required by the act.

2. That it is not stated, that the insolvent, at the time of presenting his petition, delivered to the chief justice an account of his creditors, and of the moneys owing to them, or an inventory of his estate, in the words of the act; and that only one affidavit is mentioned.

3. That it does not appear, nor is it stated, that the chief justice was satisfied, &c.

4. That it is not stated that there was any publication of a notice to the creditors to show cause, &c.

5. That the assignment is not in conformity to the act, the word "securities" being omitted.

6. That the certificate of discharge was not executed in the presence of witnesses.

E. Williams, for the plaintiff, contended, that the plea *was sufficient. That by the liberality of courts, in modern times, less strictness was required. It is enough, to show that the judge or court had jurisdiction, and then to state generally a conformity to the act, and a subsequent discharge. He cited

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NEW-YORK, *Service v. Heermance*, 1 *Johns. Rep.* 91. *Peebles v. Ketle*
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Rodman, contra. If the party undertakes to set out all the facts, to bring himself within the statute, he must state them correctly. He is not bound to plead specially; but if he elects to do so, he must take care that all the facts he relies on are truly and accurately set forth. It must be shown that the judge has jurisdiction; but unless three fourths of the creditors in amount subscribed the petition, the judge had no jurisdiction. Where a statute directs an assignment, and prescribes certain words, those words must be exactly used. And where a judge is required to do certain acts, it must be shown that he has pursued the directions of the statute. He cited 2 *Ld. Raym.* 1262. 1546. 2 *Stra.* 869. *S. C.* 2 *Wils.* 139. *Com. Rep.* 205. 2 *Salk.* 521, 522. 1 *Bos. & Pull.* 448. 2 *Chitty's Plead.* 636. note (a). *Cruger v. Cropsey*, 3 *Johns. Rep.* 242.

SPENCER, J., delivered the opinion of the court. There are several exceptions to the plea, relating to omissions in stating the proceedings according to the act; but a decision as to the first and second objections, will dispose of the rest.

The defendant below had his choice of three modes of availing himself of his discharge.

1. The act authorizes the pleading of the general issue. and giving his discharge in evidence.

2. He could have pleaded, that, being an insolvent debtor, within the true intent and meaning of the act, he, in conjunction with three fourths of his creditors in value, &c., did present his petition, stating it, and that *such proceedings were thereupon had, agreeably to the act, that the chief justice discharged him by a writing under his hand and seal, setting it forth, and concluding with a verification. Or,

3. He might plead the whole proceedings which took place, in relation to his discharge.

The decision of this court, in the case of *Service v. Heermance*, (1 *Johns. Rep.* 91.) sanctioned the second method of pleading, which has been mentioned.(a) It was held in that case, that a discharge under the insolvent act, might be pleaded, in the same manner as the proceedings of an inferior court were allowed to be pleaded; that it was sufficient to state enough to give the magistrate jurisdiction, and then, *taliter processum fuit*, that he was discharged by the magistrate. In the present case, the defendant below has not adopted that method; but has preferred to set out all the proceedings, or, in other words, has professed to state the particular occurrences which led to the discharge, &c. Having done so, he was

(a) The decision in *Service v. Heermance* has since been repeatedly recognized. Vid. sup. 75, note.

bound to state a conformity, in every respect, to the directions of the act. The plea omits to state, that three fourths in value of the insolvent's creditors united in the petition, or that the accounts and inventory required by the act were delivered to the judge. If, however, the same principle adopted in *Service v. Heermance* was extended to this plea, there is still a fatal omission; there is not enough stated to give the judge jurisdiction, for it is not alleged that three fourths of the insolvent's creditors in value had, in conjunction with him, signed the petition.

It is an elementary principle in pleading, that every plea must be so pleaded as to be capable of trial; and, therefore, must consist of matter of fact, the existence of which may be tried by a jury, as an issue; or its sufficiency, as a matter of defence, determined by the court, on demurrer. (1 *Chitty's Plead.* 519.) There are but two instances that are recollected, in which the party is *allowed a general pleading; the one is in a case like the present, where, after stating the facts which give the judge jurisdiction, his discharge may be pleaded, without stating all the facts which took place; and the other is, where the stating of all the facts would lead to great prolixity and tediousness. In the first case, after enough is alleged to give jurisdiction, the law presumes that the judge did his duty, and required those things to be done which were necessary. In the other case, dispensing with the pleading all the facts is for the purpose of saving expense and unnecessary prolixity, in stating multifarious facts. 2 *Johns. Rep.* 413. and 5 *Johns. Rep.* 175.

The opinion of the court in *Service v. Heermance* was principally founded on the case of *Ladbroke and Gyles v. James*, (*Willes*, 199.) The defendant, to prevent execution against his body, under the act of 10 *Geo. II.* after stating the time when the cause of action arose, so as to bring his case within the act, pleaded, that, at a quarter sessions of the peace, held, &c., before, &c., "he was duly discharged from his imprisonment aforesaid." On a demurrer to the replication, the validity of the plea came under consideration; and the court unanimously held it to be bad; *Willes*, Ch. J., said, "that if it had appeared that the sessions had a jurisdiction, it would have been sufficient to have said generally, that the sessions had discharged him; but where an imprisonment is necessary, it must always be set forth, that the party was in prison, in order to give the justices jurisdiction; and (he observes) it is not set forth in the present plea, that the party surrendered himself, or was ever in prison." And in *Sollers v. Lawrence*, (*Willes*, 416.) Ch. J. *Willes* again states the rule, that it must appear by what is set forth in the record, that they had a jurisdiction. This observation was made when considering the acts of persons having a limited jurisdiction. It cannot be pretended, that the power given by *the legislature to the judges of the Supreme

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NEW-YORK, Court, under the insolvent act, constitutes each of them a court.
Nov. 1810. in vacation, of general jurisdiction over insolvents. Though
 they act as a court in each case, their jurisdiction is limited by
 the act; and unless the insolvent presents a petition in conjunction with creditors, to whom he was indebted, at least, to three fourths of all the money owing by him, they have no jurisdiction of the case. This being, then, a necessary fact to give jurisdiction, it should have been explicitly stated; upon the same principle that the fact of imprisonment was held necessary to be stated in the case before cited. In that case, it was stated in the plea, that the defendant was duly discharged from his imprisonment; and here, that the defendant appeared before the chief justice, and delivered to him, according to the act, &c., the petition, &c. In both cases, it may, with some propriety, be said, that the pleas give jurisdiction. In the one case, if the defendant was duly discharged from imprisonment, it was to be intended he must have been in gaol; and in the other, if the petition was presented according to the act, that creditors, to whom three fourths were due, must have united in it. But the law is not satisfied with inferences, when the fact itself is material, and may be traversed.

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To uphold this plea would be against all my ideas of good pleading, and I am sure it is without precedent. What fell from the court in *Cruger v. Cropsey*, (3 Johns. Rep. 242.) does not affect the question. There, the plea was objected to on various grounds, and we only say it was bad; it was a correct opinion, delivered *instantly*, and without particular investigation. The judgment ought to be affirmed.

VAN NESS, J., having formerly been concerned as counsel in the cause, gave no opinion.

Judgment affirmed.

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* **JACKSON, ex dem. CAMPBELL and READE, against**
HOLLOWAY.

THIS was an action of ejectment. The cause was tried at the *Dutchess* circuit, in *August*, 1809, before Mr. Justice A., being seised of land, in right of his wife, executed a lease to B. for life, in 1796, which was assigned to C. In 1806, A. and his wife executed a lease to D. for the same land, for the same lives, and with the same covenants. A. died in 1808, and the wife, after the death of her husband, in 1809, received rent of C.

It was held, that the wife, having joined with her husband, in executing the lease, in 1806, which was duly acknowledged according to the statute, she put it out of her power to affirm the lease given by her husband in 1796, and that D. could not be prejudiced by her acts.

It seems, that where the wife is not a party to a lease, it is void as to her; and an acceptance of rent or any act of the wife after the death of her husband, will not confirm it. (a)

(a) *Jackson v. Sears*, 10 Johns. R. 435. *Jackson v. Stevens*, 16 Johns. R. 110. *Jackson v. Cairns*, 20 Johns. R. 301. *Doe v. Howland*, 8 Cowen, 277.

Spencer. A verdict was taken for the plaintiff, subject to the opinion of the court, on the following case:

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The plaintiff gave in evidence, a lease, duly executed and acknowledged, for 187 acres of land, in the town of *Pawlings*, including the premises in question, dated the 26th of *April*, 1806, from *John Reade*, and *Catharine*, his wife, one of the lessors of the plaintiff, to *Archibald Campbell*, the other lessor, for the lives of *Justus Holloway*, the defendant, *William Holloway*, his brother, *Ransom Holloway*, (son of *William Holloway*), and *William H. Howard*, son of *Richard Howard*. The rent reserved, was 13 bushels of wheat, and two hens, payable the 1st of *April*, at some convenient place, to be appointed within 40 miles of the premises.

It appeared, that *Justus Holloway*, the defendant, is, and had been for some time past, in possession of a lot of land, described in the lease, claiming to hold under the *Reades*, and had often admitted that the right of soil belonged to Mrs. *Reade*, one of the lessors, and that *John Reade*, her husband, had a mere life-estate. He applied to *Campbell* to sign a deed, confirming his title; that when *Campbell* complained to Mr. *Reade*, of paying rent for the whole lot, Mr. *Reade* sent a letter to *Justus Holloway*, directing him to deliver up the possession to *Campbell*, which letter was delivered to *Holloway*. At the time of executing the lease, in 1806, the persons mentioned therein were, and now are, in full life. It appeared, also, that when this lease was executed, *Campbell* delivered up to Mr. *Reade* an old lease of the same premises, from Mr. *Reade* to *William Holloway*, and which, *by assignment, had come to the possession of *Campbell*, and under which the lot had been previously held. Mr. *Reade* died the 28th of *October*, 1808.

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The defendant then gave in evidence the lease from Mr. *Reade* to *William Holloway*, duly executed, dated the 11th of *February*, 1796, for the same lives, reserving the same rent, containing the same covenants, and conforming, in all respects, to the lease above-mentioned as having been given up by *Campbell* to Mr. *Reade*, in 1806.

The death of *William Holloway* was proved; and that by his last will and testament, he appointed *Joseph Holloway* and *John Holloway*, his executors, and authorized them, in case of a deficiency of his personal estate, to sell as much of his real estate, as would be sufficient to pay his debts.

The defendant also produced an assignment from the executors of *William Holloway*, which was witnessed by *Campbell*, one of the lessors, dated the 28th of *March*, 1803, by which the executors bargained, demised, and quitclaimed to the defendant, the north half of the lot, being the premises in question, possessed by the defendant, who was to pay half the rent. There was also an endorsement on the lease, under the hands and seals of the executors, and witnessed by *Campbell*,

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dated the 28th of *March*, 1803, certifying that the executors had released to the defendant, the one half of the lease, to wit, the north half of the lot, he paying half the rents.

The defendant also gave in evidence an assignment, endorsed on the lease, from *Joseph Holloway*, surviving executor of *William Holloway*, to *Archibald Campbell*, dated the 26th of *April*, 1806, by which he assigned and transferred all their right and title, &c., subject to the rents, conditions, and reservations contained in the lease.

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After the death of *John Reade*, in the month of *January*, 1809, the defendant paid to Mrs. *Reade* the rent *due on the old lease, for one half of the lot, possessed by the defendant, from *May*, 1808, to *May*, 1809, being seven bushels of wheat and two fowls, for which receipts were given.

Receipts were also produced, dated the 30th of *March*, 1806, and the 14th of *January*, 1807, to *Archibald Campbell*, from *John Reade*, "in full for rent due on the farm formerly leased to *William Holloway*, but now leased to the said *Archibald Campbell*."

J. Tallmadge, for the plaintiff. *Bacon*, in his *Abridgment*, (4 *Bac. Abr.* 13. tit. *Leases*, C. 1. *Bro. Accept.* 10. *Leases*, 24. *Cro. Jac.* 332. *Co. Litt.* 45. b. *Plowd.* 137. 2 *Anders.* 42.) lays it down, "that if a husband, seised of lands in right of his wife, make a lease thereof, reserving rent, this is a good lease for the whole term, unless the wife, by some act, after the husband's death, shows her dissent thereto; for if she accepts rent, which becomes due after his death, the lease is thereby become absolute and unavoidable."

But it will be found, that the authorities cited by *Bacon*, do not bear out his position. In *Bro. (Acceptance*, 10. *Y. B.* 21 *Hen.* VII. 38.) the counsel, *arguendo*, say, that if a lease is made by the husband and wife, of the wife's lands, reserving rent, and the wife accepts the rent, after the death of her husband, she makes the lease good. In *Bro. (Leases*, 24.) it is said, directly contrary to the position of *Bacon*, that if a husband, seised in right of his wife, leases her lands, and dies within the term, the lease is void by his death. It is true, that in *Plowden*, 137. the counsel *arguendo*, say, that if a man makes a lease for years of his wife's land, and die, the lease is not void, before entry made by the wife, but voidable only; and it is so decided in *Cro. Jac.* 332. (See 4 *Vin. Abr.* 101. *Baron & Feme*, Z. 10, 11.) But in *Bro. Cui in vita*, 1. *Accept.* 1. it is said, that if a lease be made by the husband only, and he dies, and his wife accepts rent, such acceptance does not bind her, for she was not privy to the deed. (See *Wotton v. Hele*, 2 *Saund.* 180. note 9.) There is a difference between a lease by the husband and wife, and a lease by the husband only. *Coke (Co. Litt.* 45. and 351. a. *Finch's Law*, 31.) says, that a man, *seised in right of his wife, together with

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nis wife, may make leases, by indenture, for 21 years, agreeable to the statute of 32 *Hen.* VIII. which were voidable at the common law.

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Mrs. *Reade* never joined in the lease to *William Holloway*; and no act of hers, after the death of her husband, will make it good. The lease was void on the death of her husband, and incapable of being confirmed. (*Cruise's Dig.* tit. *Deed*, c. 7. s. 58—66.)

J. Emott, contra. A husband acquires, by marriage, a freehold in his wife's lands. (*Co. Litt.* 325. b. note 2.) The lease of Mr. *Reade*, being by deed, did not determine by his death; but was voidable only by the entry of the widow. The title *Leases*, in *Bacon's Abridgment*, it is well known, was written by Baron *Gilbert*, and the text has been always held to be good law.

Whether the wife join in the lease or not, makes no difference. Before the statute of 32 *Hen.* VIII. the act of the wife in joining in the lease, was a perfect nullity. She could alienate only by a fine or common recovery. The cases, therefore, which have been cited to show a mistake in *Gilbert*, or *Bacon*, grounded on the distinction between a lease by the husband and wife, and by the husband alone, are inapplicable.

The lease continued valid until avoided by the entry of Mrs. *Reade*, after the death of her husband. She has made no entry, nor done any act to avoid it; but on the contrary, by her acceptance of rent, she has confirmed it, and made it unavoidable.

The new lease did not destroy the interest created by the old lease. During her coverture, the wife could do no act disaffirming the old lease; nor could she convey or transfer her right or power to disaffirm. The new lease would operate only when the old lease had ceased or determined. If, by her act, the wife put it out of her power to disaffirm, the old lease became unavoidable. (4 *Bac. Abr.* 16. *Gold.* 13, 14.) The old lease was produced at the trial, and must be *considered as still in existence, and in full force. A surrender binds only the parties; it does not affect any interest a stranger had in the estate before the surrender. (*Co. Litt.* 338. b.)

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THOMPSON, J., delivered the opinion of the court. The defendant claims title to the premises, under a lease from *John Reade* to *William Holloway*, dated in the year 1796. *John Reade*, however, had only a life-estate, the fee being in his wife *Catharine*, who is one of the lessors. The other lessor, *Campbell*, claims title under a lease from *John Reade* and *Catharine*, his wife, dated in the year 1806, duly acknowledged by them. *John Reade* has since died, and his widow has accepted rent from the defendants.

If we are to examine and decide this case upon the score

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of *English* authority, as the counsel seem to have argued it, the question before us would be, whether the acceptance of rent, by Mrs. *Reade*, was an affirmance of the old lease from her husband; and how far the acceptance of rent would affect her interest, would depend on the question whether, as to her, the lease from her husband was void, or only voidable. This is a point which seems not to be altogether settled in the *English* books. In *Bacon's Abridgment*, (tit. *Leases*, C. p. 13.) it is laid down, as a doctrine clearly agreed to, that if a husband seised of lands, in right of his wife, make a lease thereof by indenture, or deed-poll, reserving rent, that this is a good lease for the whole term, unless the wife, by some act after the husband's death, shows her dissent thereto; for if she accepts rent that becomes due after his death, the lease thereby becomes absolute and unavoidable; and that if the wife join in such lease for years, if not made pursuant to the statute of 32 *Hen. VIII.* c. 28. she is, after her husband's death, at liberty either to affirm it, by acceptance of rent, or to dissent to and avoid it, in the same manner as if she had been *no party thereto. The authorities, however, referred to, do not seem fully to support the positions there laid down. Serjeant *Williams*, in his note to 2 *Saund.* 180. (11. 9) has collected most of the cases on the subject. And from many of the old authorities, it appears, that if the lease was made by the husband alone, and the wife, after his death, accepted rent, the acceptance would not bind her; but if she had joined in the lease, and then accepted rent, after the death of her husband, she would have been bound by it. And whether the lease was for life or years, did not vary the principle, but only changed the remedy.

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From the cases there referred to, it is justly observed, that the law is not so clearly agreed, as it is said to be, in the passage cited from *Bacon's Abridgment*. And was it necessary here to decide the question, I should incline to the opinion, that where the wife is not a party to the lease, it is void, as to her, and, of course, not affirmed by the acceptance of rent. The weight of authority appears to me to be on this side of the question. And it is most conformable to the general rules of law, applicable to the rights of *femes covert*. It would seem a little incongruous, to speak of a deed as *voidable* by a person who was not a party, or privy to it, nor had any agency in its execution. The very term implies some agency in the act which is to be avoided. But it is unnecessary to give any definitive opinion on this point.

In *England*, by the statute of 32 *Hen. VIII.* (c. 28.) leases of the estates of *femes covert* are valid if made in the name of the husband and wife, and she seals the same, and the rent is reserved to the husband and his wife, and the heirs of the wife, according to her estate of inheritance. In other cases, the interest of a *feme covert* in real estate is divested only by

fine and recovery. We have not adopted the statute of *Hen. VIII.* But it is not necessary, with us, to have recourse to fine and recovery, in order to pass the estate of a *feme covert*. She *may, during her coverture, part with the whole, or any portion of her interest, in real estate, if the deed be acknowledged, in the mode prescribed by the statute, concerning the proof of deeds. (1 *Rev. Laws*, 478.) [1 *R. S.* 758.] The words of this act are general, extending to any estate of the *feme covert*. Mrs. *Reade* having, with her husband, executed and duly acknowledged the lease to *Campbell*, in 1806, did thereby put it out of her power to affirm the lease given by her husband, in 1796, to *William Holloway*. *Campbell's* rights, during the continuance of his lease, could not be prejudiced by her acts. This ground is, of itself, sufficient to entitle the plaintiff to recover.

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Judgment for the plaintiff.

COMSTOCK against SMITH.

THIS was an action of *assumpsit*. The declaration contained five counts: 1. *Indebitatus assumpsit*, for 2,000 dollars, for a farm sold, &c.; 2. *Quantum valebat* thereon; 3. Money had and received; 4. "For that whereas the defendant, on the 15th March, 1808, &c., in consideration that the plaintiff had before that time sold and conveyed to the defendant a certain farm, &c., then and there undertook to pay," &c.; 5. "For that whereas, on, &c., at, &c., the defendant promised and agreed, as part consideration for a certain farm, &c., which the plaintiff had before that time sold and conveyed to the plaintiff, that he would pay," &c.

A verdict having been found for the plaintiff,

**Gold*, for the defendant, moved in arrest of judgment,

1. Because there is no sufficient consideration set forth in the fourth and fifth counts of the plaintiff's declaration, to support the *assumpsit*; and the farm alleged to have been sold, &c., is not said to have been sold and conveyed at the request of the defendant.

Where, in an action of *assumpsit*, the plaintiff, in his declaration, stated, that the defendant, "in consideration that the plaintiff before that time sold and conveyed a certain farm, &c. to the defendant, the defendant then and there undertook," &c. it was held, that the count was

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not sufficient to support the action, the promise being founded on a *past consideration*, and it not being alleged that the farm was con-

veyed at the request of the defendant.

Where a promise is founded on a past consideration, it must be laid to have been done on the request of the party promising, or, at least it must appear, that he was under a *moral* obligation to do the act, or procure it to be done. (a)

(a) A request may be implied from the beneficial nature of the consideration, and the circumstances of the case. 10 *Johas. R.* 943. *Hicks v. Burkens*. And it is the province of the jury to determine from the evidence whether a request can be implied or not. *Outfield v. Waring*, 14 *Johas. R.* 188. See also *Duty v. Wilson*, 14 *Johas. R.* 378. *Eserts v. Adams*, 19 *Johas. R.* 352. *Edwards v. Davis*, 16 *Johas. R.* 383, note (a). *Bartholomew v. Jackson*, 20 *Johas. R.* 28. *Chaffin v. Thomas*, 7 *Crown*, 358. *Parker v. Crane*, 6 *Wendell*, 647.

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2. Because, in the fifth count, it is not alleged that the promise and undertaking of the defendant was in consideration of the farm being sold and conveyed to the defendant. He cited 3 *Caines*, 134, 139, 333.

N. Williams, contra.

Per Curiam. This is a motion in arrest of judgment. The fourth count states, that the defendant, "in consideration that the plaintiff had there, before that time, sold and conveyed unto the before-named defendants a certain farm or lot of land, situate in the town of *Adams*, in the said county of *Jefferson*, the defendant then and there undertook," &c. This is a promise grounded on a past consideration, and all the cases agree that it must be laid to have been done upon request of the party promising, or at least it must appear that the party promising was under a moral obligation to do the act himself, or procure it to be done. (See the cases well collected in 1 *Saund.* 264. note 1. and 1 *Fonb.* 336. and they are referred to in 1 *Caines*, 585.) It does not seem requisite in every case of a past consideration, to lay an express request in the declaration, though the cases in which it is not required are rather exceptions to the general rule. They are such in which a beneficial consideration and a request are necessarily implied from the moral obligation under which the party was placed. (*T. Raym.* 260. 3 *Burr.* 1672. 1 *Caines*, 586. *Str.* 933. 2 *Leon.* 111. 1 *Fonb.* 336.) If we *apply this rule to the present case, we cannot say that either benefit or duty were necessarily implied from the act done by the plaintiff. The plaintiff may have had no title to the lot conveyed. The nature of the estate conveyed is not alleged, nor is it in any way described. It may have been held adversely at the time of the conveyance, or the deed may have been delivered as an escrow, or never accepted by the defendant. It would be departing from all precedent to say, that here was enough implied to cure the want of an averment of the act being done upon request.

This objection equally applies to both counts, and the judgment must consequently be arrested.

Judgment arrested.

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HAWES.VOORHIS *against* WHIPPLE and HAWES.

THIS case came before the court, on a *certiorari*, directed to two justices of the peace.

The proceedings below were under the 16th section of the act for the settlement and relief of the poor, (24 sess. c. 184. 1 *Rev. Laws*, 571.) [1 *R. S.* 622. 623. sec. 31, *et seq.*] and are, shortly, these: One *Carril* came into the town of *Richfield*, in the county of *Otsego*, and soon after became wounded and disabled, so as to be incapable of being removed to his supposed legal place of settlement in *Charleston*, in the county of *Montgomery*, upon which the overseers of the poor of *Richfield* gave notice of these facts to *Voorhis*, one of the overseers of the poor of *Charleston*, requiring him to relieve the pauper during his illness, which he neglected and refused to do. The overseers of the poor of *Richfield* expended 334 dollars and 15 cents, in maintaining the pauper, after notice to *Voorhis*. These allegations *being made before two justices of the peace of *Montgomery* county, and proved to them on oath, they issued their warrant, ordering that sum to be made, by public sale of the goods and chattels of *Voorhis*.

In their return to this *certiorari*, the two justices set forth their warrant, which stated, that *Whipple* and *Hawes*, overseers of the poor of *Richfield*, complained and gave them the said justices to be informed of the facts above-mentioned, "which said complaint and allegations were proved and verified by oath before them."

Voorhis assigned for causes of quashing the warrant of distress:

1. That no adjudication had been made that the pauper was last legally settled in *Charleston*, before he had notice to provide for him.
2. That it does not appear from the warrant, that the justices had legal evidence that the pauper's last legal place of settlement was in *Charleston*.
3. That it does not appear by the warrant, that he had any notice of the complaint made to the justices.

To this assignment the overseers of the poor of *Richfield* pleaded, that on the pauper's recovering from his wounds and sickness, so as to be capable of being removed, an order was made by two justices of the peace, in pursuance of the act, adjudging the pauper's last legal settlement to be in *Charleston*; which order, on appeal to the General Sessions of the Peace for the county of *Otsego*, was confirmed.

(a) *Ex parte Overseers of Gates*, 4. *Coven*, 137. acc. And see *Gourley v. Allen*, 5 *Coven*, 644.

(b) *Vid. People v. Supervisors of Oswego*, 2 *Wendell*, 291.

Under the 16th section of the act for the settlement and relief of the poor, (24 sess. c. 184.) there must be an adjudication of two justices, after examining the pauper on oath, as to the place of his last legal settlement, before they can issue any warrant against the overseers for the expenses of his maintenance. (a)

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A subsequent adjudication and a confirmation on appeal, will not render a warrant previously issued, valid, but it will be quashed, on return to a *certiorari*. (b)

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To this plea there was a demurrer and joinder.

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Cady, in support of the demurrer. The 7th section of the act for the settlement and relief of the poor, provides for the removal of strangers who have no settlement, and who are likely to become chargeable; and any two justices may cause such person to be brought before them and examined, and may direct him to remove to the place of his former settlement, and if he neglects *or refuses, they may issue a warrant for his removal.^(a)

The 16th section of the act provides for the case of such stranger, being so sick or lame as to be incapable of being removed. Notice of the fact is to be given to the overseers of the poor of the place of his last legal settlement, with a request to them to provide for his relief and maintenance during his illness, &c., and on their neglect and refusal, two justices of the peace of the county in which the place of such pauper's legal settlement shall be, on complaint made to them, are authorized to cause the money expended for his maintenance to be levied by distress and sale of the goods of the overseer so neglecting or refusing, &c.

The first question for the two justices to decide was, whether they had jurisdiction; for they can have no jurisdiction or authority to issue the warrant, until the place of the pauper's last legal settlement is ascertained. They have no means of making this inquiry. It is essential, therefore, that there should be an adjudication of the place of legal settlement, before the justices can proceed to act.

A mere notice to the overseers is not sufficient to protect them; and without a prior adjudication they must act at their peril.

Again, if there had been a prior adjudication, the justices would not be authorized, on a mere complaint, without any inquiry or hearing of the party, to issue their warrant to levy to any amount.

In cases of summary proceedings, where no particular mode of proceeding is prescribed by law, that mode must be pursued which is according to the principles of justice. The party should be summoned to answer the charge against him; and the witnesses in support of the charge should be examined in his presence. (2 *Burr.* 1164, 1165, 1166. 3 *Burr.* 1786 *Str.* 1240.) Where a party has not received notice, or been summoned, the defect can be cured only by his appearance (*Salk.* 181.)

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*In the present case, it is evident that the overseer did not appear; and he could not have been summoned, for the com-

(a) Where a pauper has actually become chargeable to the town, there is no necessity to order him to remove to his last legal settlement, previously to issuing a warrant for his removal. *Overseers of Vernon v. Overseers of Smith villa*, 17 *Johns. R.* 89.

plaint was made and the warrant issued on the same day. Such a summons is not reasonable nor legal. (2 *Str.* 261.) [1 *R. S.* 94. *sec.* 13.]

By the fifth article of the bill of rights, (10 *sess. c.* 1.) it is declared, that no man shall lose his freehold, goods, or chattels, unless he has been brought to answer, and has been forejudged of the same by due course of law. Here the property of the plaintiff in error has been taken from him to the amount of \$34 dollars, for the few weeks' maintenance of a pauper, without his having been called on to answer, or having had an opportunity to contest or disprove the justness or propriety of the charge.

The case of *The King v. Inhabitants of Great Marlow*, (2 *East*, 244.) shows, that the warrant and proceedings may be brought, by *certiorari*, before this court, for the purpose of being quashed.

Gold, contra. 1. After the pauper was cured, an order of removal was made, from which there was an appeal by the overseers of the poor of *Charleston*, which was confirmed, and an adjudication made against *Charleston*. The overseers of that town are now estopped to say, that the legal settlement of the pauper is not in *Charleston*. (*Outram v. Morewood*, 3 *East*, 346.) The question, therefore, as to the place of settlement, is put at rest by the adjudication of the sessions. An order of settlement, when made, binds all parties, until repealed. (2 *Salk.* 481, 482. 12 *Mod.* 419.)

Where proceedings are brought up on a *certiorari*, the court are not confined to the record, as in the case of a writ of error, but may direct an issue to try a fact, if necessary to the attainment of justice. The order, having been confirmed on appeal, is final and conclusive, unless there is error in form. (19 *Vin.* 380. *Poor*, H. *Vent.* 310. *Burr. Sett. Cas.* 489. 2 *Bott. P. L.* 742, 743.)

2. The 17th section of the act provides, that every person who thinks himself aggrieved by any judgment or warrant of the justices, may appeal to the next general sessions. This is the proper course, and ought to have been pursued.

3. The warrant has been issued in precise conformity to the directions of the act. The 16th section of the act does not contemplate the interference of any magistrate, or any adjudication. It declares, that if the overseers of the poor of the town from whence the pauper came, shall, after notice to them, neglect or refuse to provide relief, two justices, on complaint to them, may issue a warrant. The object of the 16th section is to provide the means of raising the money, promptly and summarily, in so urgent a case. If an adjudication is to be first made, from which an appeal may be made to the sessions, great delay and inconvenience will arise. If the money cannot be raised immediately, the object of this section of the act

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will be defeated. It was intended to provide for a case of urgent necessity. It is very different from the seventh section, where no such necessity exists.

The 16th section prescribes a notice, but is silent as to any adjudication. How, then, could there be any appeal? The magistrates say the facts were proved to them by oath, and they issued a warrant accordingly. They could not adjudicate. They had no authority to examine the pauper.

The terms of the 16th section are as strong to authorize the issuing a warrant in this summary mode, as in several cases, which have been sanctioned by the decisions of the court. (*Bennett v. Ward*, 3 *Caines*, 259. *Bouton v. Neilson*, 3 *Johns. Rep.* 474.) I grant that inconveniences may sometimes arise; but it is not possible to provide a *summary* remedy, and yet allow all the forms of regular proceedings by notice, adjudication and appeal.

If these proceedings are quashed, how are the overseers of *Richfield* to be relieved or reimbursed?

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Van Vechten, in reply. The plea admits the want of adjudication and notice. If the burden of the expense of maintaining the *pauper* is to be transferred from **Richfield* to the place of his last legal settlement, it is indispensable that the place of his legal settlement should be first ascertained, before any notice is given.

Will the court subject the overseers of *Charleston* to this penalty, without any notice, or any opportunity of being heard? Perhaps, the true place of legal settlement was at *Richfield*; and shall *Charleston* be charged, in this way, with the expense of the pauper's maintenance? Is this prompt and summary remedy to be applied, without first knowing what town is legally chargeable with the expense? If there is to be no previous adjudication as to the legal settlement, the warrant may be issued against the overseers of any one town as well as another.

If there had been an appeal from this warrant, and it had been set aside, could the sessions have ordered a restitution of the money? How would the overseers of *Charleston* recover back the money they might have paid?

It is said, the warrant being brought up by *certiorari*, this court may direct an issue to try whether the pauper was legally settled in the town against the overseers of which the warrant issued. But this is inverting the natural and proper course of proceeding. It is first to make the overseers of *Charleston* liable for the money, and then to inquire, whether they ought to be made liable.

The cases of *Bennett v. Ward*, and *Bouton v. Neilson*, are not analogous. There the public at large were interested in the highways; and the case necessarily required a prompt remedy. The complaint was made by a public and sworn officer, who had no interest in the case.

Per Curiam. The inducement to the enacting of the 16th section of the act for the settlement and relief of the poor, was to relieve the town where a pauper happened to be taken sick or lame, so as not to be able to be removed back to the place of his last legal settlement; but in providing for this summary relief to *the town actually burthened with the pauper, it presupposes that the place of his last legal settlement has been ascertained, according to the provisions of the 7th section, to wit, by an order of two justices, making an adjudication upon the fact, after having themselves examined the pauper on oath.

To give the 16th section any other construction, would lead to great abuse and oppression. Towns might be charged, if the manner of proceeding in this case is sanctioned, with the payment of large sums of money, unjustly, and without the examination of the pauper himself, which is essentially requisite to find out his last legal settlement. This not having been done in this case, the warrant issued illegally.

It has been contended, that the subsequent proceedings made the warrant valid. The cases referred to contain no such doctrine. The warrant was good or bad when it issued; and cannot be aided by what took place afterwards.

Warrant quashed. (a)

(a) The provisions of the Revised Statutes relative to the settlement and support of paupers are materially different from those which existed when the above decision was pronounced. They may be found in vol. 1. p. 622. sections 32, 33, 34.

GRAY *against* GOODRICH.

IN ERROR, on *certiorari* from a justice's court.

Gray was sued by Goodrich, in the court below, for a *deceit* or *fraud* in the exchange of horses. The defendant pleaded the general issue, and claimed damages on his side. There was a trial by jury. There was some slight evidence tending to show a *scienter*. Gray, on being asked if the horse was sound, answered, he was, for aught he knew: and he boasted, afterwards, that he had made a great bargain. The justice also admitted, in evidence, the declarations of a person deceased, who was a witness to the bargain. *This was objected to. The jury found a verdict for the plaintiff, on which the justice gave judgment.

The cause was submitted to the court without argument.

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Testimony as to the declarations of a person deceased, unless made on oath, or in *extremis*, when he came to a violent end, is inadmissible. (b)

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(b) Vid. *Wilson v. Boerem*, 15 Johns. R. 286. *Jackson v. Vredenburg*, 1 Johns. R. 159. *Jackson v. Kniffen*, 2 Johns. R. 31. *Jackson v. Betts*, 6 Cowen, 377. But see S. C. in error, 6 Wendell, 173.

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Per Curiam. The testimony to establish the *scienter* (even admitting the declaration of the deceased person) was rather loose. The hearsay evidence was, however, the strongest; and coming from a person called as a witness to the bargain, had, probably, the greatest influence with the jury. This evidence was clearly inadmissible. The law requires the sanction of an oath to all *parol* testimony. It never gives credit to the bare assertion of any one, however high his rank, or pure his morals. The cases of pedigree, prescription or custom, are exceptions to the general rule. The person from whom the declarations came, being dead, cannot vary the case essentially; it is still not a relation upon oath. What a deceased person has been heard to say, except upon oath, or *in extremis*, when he came to a violent end, never has been considered as competent evidence. The judgment must, therefore, be reversed.

Judgment reversed.

CAPRON against AUSTIN.

A summons to appear before a regimental court martial, to show cause why a fine [* 97] should not be levied, under the 30th section of the act to organize the militia of the state, (sess. 24. c. 166.) is in the nature of *process*, and must be served *personally*.

An action lies against the president of a regimental court martial, for issuing a warrant by which a fine was collected, when the party had not been personally served with a summons, to appear and show cause, but only a copy thereof left at his house. (*But see act, sess. 32. c. 165. sect. 76.*)

IN ERROR, on *certiorari* from a justice's court.

Austin brought an action against *Capron*, in the court below, to recover back a fine, which had been imposed on the plaintiff, *Austin*, by a regimental court martial, of which the defendant below (*Capron*) was president, *for a pretended delinquency in not appearing at a military parade. The declaration was special. It stated the fine to have been imposed, on the 24th of *October*, 1808, without causing the said *James* to be *summoned according to law*; and the plaintiff averred, that he never knew or heard of the court martial until some days after it was over; and that he never was required to attend. The plaintiff also alleged, that the defendant, in order to defraud and wrongfully obtain money from the plaintiff, issued his warrant to collect the sum, well knowing it was illegal. The defendant pleaded not guilty. The cause was tried by a jury.

On the trial, it appeared, that a copy of the summons to attend the court martial was left at the house where *Austin* resided, a few days before the meeting of the court martial, *Austin* being absent from home. A paper was then produced, called the original summons, signed by *Capron*; but the name of *Austin* was not in the body of the summons, but was written on the back of it, by the officer or person who left the copy, with other names. It was not certified on the summons, in what manner the person had been notified. The name of the

[1 R. S. 302. 303. 309. 314.]

officer was endorsed on the summons. This officer testified, that he particularly told *Capron* and the court martial, that he had summoned the plaintiff, by leaving a copy only. The plaintiff proved, that he went from home the day before the copy was left, and did not return until after the meeting of the court martial. The officer then stated, that about the 23d of *February*, 1809, he received a paper, called an execution, under the hand and seal of *Capron*, commanding him to collect of the plaintiff 10 dollars damages, and 19 cents costs, besides his fees, under which he collected 11 dollars and 57 cents, and delivered it with the execution to *Capron*.

A motion for a nonsuit was overruled by the justice, who submitted to the jury, whether the defendant had fraudulently, under color of being president of *a court martial, obtained the money from the plaintiff. The jury found a verdict for the plaintiff, for 11 dollars and 57 cents.

The cause was submitted to the court without argument.

Per Curiam. The action in the court below was to recover back a fine, which had been imposed on the plaintiff by a regimental court martial, of which the defendant was president, for a delinquency in not appearing at a military parade. The plaintiff appears to have waived the trespass, and brought his action for the money collected from him, and which came into the defendant's hands.

Although the declaration charged the defendant with having fraudulently caused the money to be levied and collected, yet this allegation is no way supported by the proof. And the only ground upon which the proceedings of the court martial were impeached, was, that the fine had been imposed without the plaintiff's having been *personally* summoned to appear. The statute provides (1 *Rev. Laws*, 516. sess. 24. c. 166.) [1 *R. S.* 309. sec. 20, 21. *Id.* 302, 303. sec. 19, 20.] that no fine, in cases of this kind, shall be levied on any delinquent, until he shall have been *summoned* to appear before a regimental court martial, that he may show cause why such fine should not be levied. If the plaintiff was not duly summoned to appear, the court martial had no jurisdiction of the case. From the evidence, it appeared, that the manner in which the plaintiff had been summoned was by leaving a copy of the summons at his dwelling-house, a few days before the meeting of the court martial, he being from home; and it was proved, that he did not return home until after the meeting of the court martial.

A copy of the summons left at the dwelling-house of the delinquent was not sufficient, within the statute, to authorize the court martial to impose the fine. Personal service was necessary. The summons required by the statute is in the nature of a process, and not like a notice, *in some collateral proceedings, in the progress of a suit. In such a case, service,

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by leaving the notice at the dwelling-house of the party, might be deemed sufficient, unless when the proceedings are to bring the party into contempt; according to the rule laid down by Lord Kenyon, in *Jones v. March*, (4 Term Rep. 465.)

The judgment must, therefore, be affirmed.

Judgment affirmed. (a)

(a) By the 76th section of the late act to organize the militia, (sess. 32. c. 165.) passed the 29th of March, 1809, it is provided, that all the summonses, from regimental courts martial, to appear and show cause why a fine should not be levied, shall be sufficient, if left with some person of suitable age and discretion, at the usual place of abode of the party. (And by the provisions of the *Revised Statutes*, (sup. p. 98.) if no such person can be found, the summons may be affixed to the door of the house.)

BEECKER against BEECKER.

On a motion in arrest of judgment in an action of *assumpsit*, the promise laid in the declaration is presumed to be an express promise. (a)

An action at law may be sustained against a devisee upon his express promise to pay a specific sum bequeathed as a legacy, and charged on the land devised, made after the

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executors had assented to the legacy, and in consideration of the devisee's having become seised of the land under the devise.

But whether an action at law will lie against a devisee or tenant in possession of land charged with the payment of a legacy, without such promise to pay the legacy, Query. (b)

THIS was an action of *assumpsit*. The declaration stated, that *Peter Beecker*, on the 22d June, 1802, made his will and devised to his son, the defendant, *all his real estate in Greenwich, in Washington county*, except the ground on which the Baptist meeting-house stood, to hold the same in fee; subject, nevertheless, to the charges, legacies and encumbrances, mentioned, &c. That by the same will he bequeathed to his daughter, the plaintiff, 90 dollars, to be paid to her in half-quarterly payments, by the defendant, during her life, upon the order of his executors; and which annuity was by the said will declared to be chargeable upon the real estate devised to the defendant. And by his *codicil*, made the 26th February, 1803, he bequeathed to the plaintiff the additional sum of 10 dollars, to be paid in the same manner by the defendant, as the said 90 dollars; that *the testator died on the 19th March, 1803, seised of the lands devised to the defendant, and without altering or revoking his will or codicil. The plaintiff then averred that the defendant, on the 19th March, 1803, entered into and upon the real estate so devised to him, and became seised of it, subject to the payment of the said annuity of 100 dollars. That the executors, on the 19th May, 1803, proved the will, and assented to the legacies. That, on the 12th September, 1809, the executors, by order in writing, directed the

(a) *Holly v. Rathbone*, 8 Johns. R. 148. acc.

(b) An action at law for a legacy is given against executors, by statute, (2 R. S. 114, 115. sec. 9.) and it may be maintained where the legacy is charged on lands against devisees or *terretenants*, upon their express promise to pay. *Kelsey v. Deyo*, 3 Cowen, 133. *Tole v. Hardy*, 6 Cowen, 333. And part payment is conclusive evidence of such express promise. *Van Orden v. Van Orden*, 10 Johns. R. 30. *Kelsey v. Deyo*, *ubi sup.* But if there be no express promise, an action will not lie, though the legacy or annuity is expressly charged on the land. The remedy is in chancery. *Pelletreau v. Rathbone*, 18 Johns. R. 428.

defendant to pay the said annuity to the plaintiff. That the plaintiff presented the order to the defendant, and requested payment, and that he refused. That the annuity for 6 1-2 years is in arrear and due from the defendant, whereof he had notice. That the defendant hath occupied the real estate aforesaid, from the death of the testator, under the will. That, by reason of the premises, the defendant became liable to pay, and being so liable, he, in consideration thereof, on the 19th September, 1809, promised to pay, &c. Yet, &c.

Plea, *non assumpsit*.

A verdict having been found for the plaintiff, the defendant moved in arrest of judgment;

1. Because *indebitatus assumpsit* will not lie to compel the payment of a legacy bequeathed by will.

2. That the action, as set forth in the declaration, is not sustainable.

3. The declaration is uncertain, and insufficient in stating the amount due; and does not state a proper demand on the defendant to pay the same.

H. Bleeker, for the defendant. 1. In *England*, where a legacy is charged on land, or to arise from the sale of real estate, it cannot be sued for in the spiritual courts, but is recoverable only in courts of equity. (2 *Woods*, 478. *Hob.* 265.) This case does not come within our statute (sess. 24. c. 174. s. 18.) giving a suit against executors. In *Atkins v. Hill*, and *Hawkes v. Saunders*, (*Cowp.* 284. 289.) *it was held, that *assumpsit* lies against an executor, upon an express promise to pay a legacy, in consideration of *assets*. But there is no case of an action of *assumpsit* brought against a devisee. In *Deeks v. Strutt*, (5 *Term Rep.* 690. 2 *Roper on Legacies*, 592.) the Court of K. B. decided, that no action at law could be maintained for a legacy; and Lord *Kenyon*, in giving his opinion, makes no distinction between an express and implied promise. He observed, "that the supporting such an action, would be attended with the most pernicious consequences; that no action (except one in the time of the commonwealth) had been maintained for a legacy in a court of law."—"If an action would lie for a legacy, no terms could be imposed on the party who was entitled to recover; and, therefore, when the legacy is given to the wife, the husband would recover at law, and no provision be made for the wife and family; whereas a court of equity would take care to make provision for the wife in such cases. The whole of that admirable system, which has been founded in a court of equity, would fall to the ground, if a court of law could enforce the payment of a legacy." And in *Farish v. Wilson*, (*Peake's N. P. Cas.* 73.) his lordship ruled at *nisi prius*, that no action at law would lie for a legacy; and he put it on the same grounds of convenience and policy; and that a court of equity alone could make such provisions as

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would suit the convenience and circumstances of the parties In *Nicholson v. Sherman*, (T. Raym. 23.) which was in the time of Charles II. it was held that an action at law would not lie for a legacy. It is true, that in the case of *Lord Saye and Seale v. Guy*, (3 East's Rep. 120. See *Freeman's Rep.* 289.) Lord *Ellenborough*, distinguishing the case from that of *Deeks v. Strutt*, held, that an action at law would lie against an executor to recover a specific legacy, after the assent of the executor to the bequest; and *Lawrence*, J., puts it on the ground, that, by the assent of the executor, the property in the chattel bequeathed vests in the legatee, and is governed by the rules of common law. But in the present case, there is no express promise *of the defendant to pay the legacy. The declaration states, that he absolutely refused to pay it.

Again, suppose that after the devisee had paid the legacy, the fund should be exhausted, he could not bring an action at law against the legatee to refund, (3 Bos. & Pull. 166.) The provision of the statute, (sess. 24. c. 174. sect. 18.) [2 R. S. 114, 115. sec. 10, 11.] requiring the legatee to give security to refund, in case there are not assets enough to pay all the legacies, shows the sense of the legislature, as to the necessity of those provisions which a court of equity can make.

Crary, contra. The declaration states an express promise; at least, it will be so considered, after verdict. The case of *Deeks v. Strutt* is not applicable. That action was on an implied promise. Besides, it was since our revolution, and so no authority here; and it was subsequent to the cases of *Atkins v. Hill*, and *Hawkes v. Saunders*, in which Lord *Mansfield* held, that an action at law would lie, on an express promise to pay a legacy, in consideration of assets.

In *Ewer v. Jones*, (2 Salk. 415. 2 Ld. Raym. 937. S. P.) Lord *Holt* held clearly, that a devisee might maintain an action, at common law, against a tertenant, for a legacy devised out of land; for where a statute gives a right, the party, by consequence, shall have an action at law to recover it. And there is good reason for this; for if the party elects to take the land devised, he must take it *cum onere*, and ought to be liable for the legacy charged upon it. In *Hawkes v. Saunders*, *Buller*, J., says, there could be little doubt that the action could be maintained where the legacy was to be paid out of land, and there was an express assent of the executors.

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In *Rose v. Bowler*, (1 Hen. Bl. 111.) *Wilson*, J., alluding to the cases in *Cowper*, where the executors made themselves liable, by their promise to pay in consideration of assets, observed, that the question then before the court, whether, by the general common law, an executor, as such, was liable to be *sued for a legacy, was a question of great importance, and still undecided; but that case was determined on a different point. In *Doe, ex dem. Lord Saye and Seale, v. Guy*, the Court of K. B.

were clearly of opinion, that an action at law would lie for a specific legacy, after the assent of the executor. (3 *East*, 120. See 1 *Saund.* 278. note. 1 *Ch. Cas.* 256. 2 *Lev.* 209.)

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KENT, Ch. J., delivered the opinion of the court. The promise stated in the declaration is to be considered, after verdict, and upon the present motion, as an express promise. This is the presumption, and so it has been received by the courts, in a variety of cases, where there was no admission of the parties to contradict it. (*Cowp.* 283. 289. 7 *Term Rep.* 350. note. 4 *Johns. Rep.* 237.) The question, then, before us is, whether an action at law can be sustained against a devisee, upon his express promise to pay a specified sum, bequeathed as a legacy, and charged upon the land devised, and made after the executors had assented to the legacy, and in consideration of his having become seised of the land under the devise.

In the cases of *Atkins v. Hill*, and of *Hawkes v. Saunders*, (*Cowp.* 283. 289.) the Court of K. B. determined that an action of *assumpsit* lay at law against an executor, on his express promise to pay a legacy, in consideration of assets received, sufficient to pay all the debts and legacies. Those decisions have been considered as shaken by the case of *Deeks v. Strutt*, (5 *Term Rep.* 690.) But the question in that case was, whether the law would raise an *implied* promise, on proof of the acknowledgment of assets, and when the legacy was payable out of the general funds of the testator; and the court held, that it would not. Lord *Kenyon* said, that it was a case almost without precedent, and that the means which a court of equity had to control the suit so as to meet the purposes of justice, particularly when the husband sued *for his wife's legacy, was a strong reason for confining the cognizance of such suits to the courts of equity. The K. B. afterwards, in *Doe v. Guy*, (3 *East*, 120.) laid much stress upon the circumstance, that the action of *Deeks v. Strutt* was upon the implied promise only. The cases in *Cowper* have not, therefore, strictly been overruled. They may be reconciled with the subsequent decisions, upon the distinction between an express undertaking, and a promise implied by law. It must, however, be admitted, that the language of some of the old cases, (*Dyer*, 264. *pl.* 41. *Moore*, 917. *Hob.* 265. *T. Raym.* 28.) as well as the general reasoning of Lord *Kenyon*, is against the action; but whoever has duly considered the authority of the two decisions in *Cowper*, and the powerful manner in which they are supported, cannot but be conscious of the weight with which they press upon the argument.

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None of the old cases appear to have arisen upon an express promise. The court was content to lay down the general rule that the legatee must sue in the spiritual courts for his legacy. The objection upon which Lord *Kenyon* seems chiefly to have relied, does not apply here; for this is not the case of

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a husband suing for his wife's legacy, and the objection *has*, perhaps, been deemed of too much importance. It would equally apply to a voluntary payment of the wife's legacy, without the assent of chancery; and it would equally prevent an action at law for a *specific* legacy, which action was sustained in the case of *Doe v. Guy*. A specific legacy may consist of money, or stock, or the profits of a farm, if it be designated with sufficient certainty. (2 *Fonb.* 375.)

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This case is different from the ordinary case of a suit against the executor, for a legacy, payable out of the general fund, and which may be maintained at law, under our statute. (Sess. 24. c. 174. s. 18.) [2 *R. S.* 114, 115. sec. 9. *et seq.*] The books have been more favorable to the suit against the devisee. Lord *Holt* (2 *Salk.* 415. 2 *Ld. Raym.* 937.) supposed that an *action at law could be maintained in this case; and in *Paschell v. Keterich*, (2 *Dyer*, 151. b. *Benloe*, 60.) all the justices held, that the spiritual courts had no jurisdiction where the money was to arise from the freehold; and that the legatee might have account at common law. Lord *Coke* held the same language; (2 *Bulst.* 257. *Dyer*, 151. b. note;) and in a case in the time of *Charles II.* (1 *Sid.* 45. *T. Raym.* 23.) *Twisden*, J., said, that in his time, it had been adjudged in the K. B. that if one by will devised a legacy, to be paid out of land, an action lay for this in that court.

These cases prove, at least, that there never was any settled course of decisions against the action; and when the devisee, or tertenant, affirms the trust, by accepting of the land, and promising to pay, the case comes within the principle of the cases decided by Lord *Mansfield*; for it is a contract founded upon a valuable consideration.

Whether a suit at law would lie against the devisee, or tertenant, without such promise, is a distinct question. It is easy to perceive difficulties in the way of such a suit, for the charge is not personal, but upon the land; and unless the devisee makes himself personally responsible, by his express undertaking, the judgment and execution ought to be special, as in the case of a suit against the heir and devisee, under the statute. Until the statute of 3 and 4 *W. & M.* there was no remedy at law, by the creditor, against the devisee. Why should the mere possession by the tertenant of the land charged, support a personal action at law, of debt, or *assumpsit*, any more than the possession of land charged with any other trust, or encumbrance? In the case of *Livingston v. The Executors of Livingston*, (3 *Johns. Rep.* 189.) this court held, that an action at law would not lie against the *personal representatives* of the devisee, upon the mere *implied assumpsit*, arising from the devise itself. The declaration, in that case, *might have warranted the presumption of an express promise by the devisee; but it was conceded upon the argument, that it was the case of an implied *assumpsit*, and the court went upon that ground. But

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whether a suit at law will lie against the devisee, or tertenant, while in possession of the land, and without any promise to pay, the court give no opinion. We confine ourselves to the case now before us, and for the reasons given, the motion in arrest of judgment is denied.

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SPENCER, J., not having heard the argument in the cause, gave no opinion.

Motion denied.

GALATIAN *against* GARDNER.

THIS was an action of trespass *quare clausum fregit*. The *locus in quo* was a piece of land in the village of *Newburgh*, adjoining the bank of the *Hudson River*, bounded on the north by a store and dock, west by *Water street*, south by *First street*, and east by the river. The plea was the general issue, and the defendant gave notice, that he would give in evidence at the trial, that the *locus in quo* was a common highway, and that the plaintiff obstructed it, and the defendant peaceably removed the obstruction, &c.; that from time immemorial, the defendant, and others under whom he claims to hold, have used the way, &c., from the public highway, called *Water street*, through the close of the plaintiff, mentioned in his declaration, to the close of the defendant, &c.

The cause was tried at the *Orange* circuit, in *September*, 1809, when a verdict was found for the plaintiff.

The cause turned upon a question of fact, whether the **locus in quo* was a public highway. It is not necessary to detail the evidence given in the case, as the substance of the testimony is stated in the opinion of the court; and it would not be well understood without an inspection of the map produced at the trial.

Fisk, for the defendant, relied on the fact, as proved by the testimony of the witnesses, that the *locus in quo* was a public highway, leading to the dock of the defendant.

Caines, contra, contended that the *locus in quo*, though part of a public way, leading from the highway to where the ferry was formerly kept, was not a legal highway, which is without a *terminus à quo*, or *terminus ad quem*. A public way for a particular purpose, is not a highway. If a way has been used as a way to a ferry, and the place where the ferry is kept is

A road used as a public highway for twenty years next preceding the 21st March, 1797, becomes a public highway, though not recorded; and it does not cease to be a public highway, though originally leading to a dock, and landing, or ferry, and such ferry has been changed, and though some part of the way has been appro-

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priated and built upon, if the passage continues open to the same dock and landing. (a)

(a) Vid. *Luon v. Munson*, 2 Cowen, 426.

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changed, the right of way in the public is transferred from the old to the new ferry. (*Com. Dig. tit. Chemin, A. 1. D. 1. 1 Vent. 189. 6 Mod. 3. Fitzh. Barre, pl. 302. 22 Assise, 93.*) Where a right of way lies in *usage*, it must be shown to be constantly in the same place; not in one place to-day, and in another place to-morrow. (*Yelv. 162, 163. Brownl. 215.*) Again, the right is shown to the whole road, not to any particular spot in the road. A right to any particular spot cannot be maintained, when the whole road has been transferred. When the road has been once changed to a different place, all rights under it, as an ancient road, are gone.

This road was never laid out and reserved as a public highway. The defendant purchased under the *Coldens*, and must be bound by their acts. A bargain and sale of land, with a way to it, does not pass the way, for the sale conveys only the use; and there cannot be a use of a way created *de novo*. (*Cro. Jac. 190.*)

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Per Curiam. The simple point of fact in this case is, whether the *locus in quo* was not a "road used as a *public highway for twenty years or more next preceding the 21st of March, 1797." If this fact be in favor of the defendant, it amounts to a justification of the trespass; for the statute (*Laws of N. Y. vol. 1. p. 595.*) [1 R. S. 521. sec. 100.] declares that every such road shall be taken and deemed a public highway, although no record thereof has been made. The evidence in this case greatly preponderates in favor of the usage. The defendant produced seven witnesses, all of whom had known the road for above twenty years next preceding March, 1797, and all declare, that it had been used during all that time as a public highway, leading to the dock and landing of the defendant.

The witnesses on the part of the plaintiff do not essentially contradict the defendant's witnesses. They principally go to prove that the road in question, at the intersection of *Water street*, had been removed some feet more to the south than it was formerly, but they admit that it had not varied where it passed over the premises of the plaintiff; and they all concur in the declaration that there is no way of getting to the dock and landing in question but by means of this road; for that *First street* has never been used, and ever has been, and still is, impassable. There is likewise one important fact established by the witnesses, and not contradicted by any, and that is, that from the year 1743 there had been a ferry kept at the defendant's landing, under a charter granted to *Alexander Colden*; and that before the war, during the war, and for some time after the war, there was no other ferry kept across the *Hudson*, at *Newburgh*, but the one at the defendant's dock.

The verdict ought, therefore, to be set aside, and a new trial granted, upon payment of costs.

New trial granted.

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*COLLIER against MOULTON.

IN ERROR, from the Court of Common Pleas of *Rensselaer* county.

Moulton brought an action of assault and battery, against *Collier*, in the court below. The declaration commenced with, "For that whereas," &c. The defendant pleaded not guilty; and gave notice that he should give in evidence, *son assault demesne*.

At the trial the plaintiff proved, that the defendant was in the house of the plaintiff, and he ordered him to go out; and the defendant replied, he would when he was ready; on which, the plaintiff seized the defendant, and pushed him out of the house, and while the plaintiff was pulling him out, the defendant struck the plaintiff.

The defendant's counsel offered to prove, that the room, in which the assault was committed, was a ball-room, which had been hired for a ball, by the witness and others, to which the defendant had been invited by them. This testimony was objected to, on the ground, that the defendant had not given notice of his intention to justify under a license; and it was overruled by the court. The defendant then offered to prove, that at the time the assault, &c. was committed, the plaintiff was not in possession of the room; but that the same had been hired by several persons, at whose invitation the defendant came there; but this evidence was objected to. It was insisted, on the part of the defendant, that the evidence was admissible, to rebut the evidence given on the part of the plaintiff; but it was contended, on the part of the plaintiff, that the evidence offered went to prove a license, *which was inadmissible under the notice of *son assault demesne*; and the evidence was rejected by the court. The defendant then offered to prove, for the purpose of *mitigating damages*, that the room, in which, &c., had been hired by three persons, for a ball, who gave a card of invitation to the defendant, to attend the ball, at the same room, and that the defendant came there in consequence of such invitation, and continued there until the plaintiff attempted to turn him out; but the court below overruled the evidence, as improper and inadmissible. The court charged the jury, that the plaintiff having proved that he was in possession of the house, might, after requesting the defendant to leave it,

whereas," &c., it is bad, on a special demurrer; but after verdict, those words may be rejected as surplusage.

To an action of trespass, *assault and battery*, the defendant pleaded the general issue, and gave notice that he should offer evidence of *son assault demesne*; and the plaintiff, at the trial, proved that he ordered the defendant to leave the house of the plaintiff; and on the defendant's refusing, the plaintiff *moliter manus imposuit*, to remove him, when the defendant resisted, and struck the plaintiff; it was held, that the defendant might give evidence to rebut the evidence of the *moliter manus imposuit*, by showing that the plaintiff had no right to remove him, or in mitigation of damages.

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Son assault, &c. is a justification, and when pleaded, the plaintiff must reply specially, *moliter manus imposuit*, and cannot give it in evidence, under the general replication, *de injuria sua propria, &c.*(a)
If a declaration in trespass commences with, "For that

(a) The general replication *de injuria, &c.* takes issue merely upon the excuse pleaded; and if the excuse is to be avoided by new facts, they should be replied specially. *Brown v. Bennett*, 5 *Coen*, 181. *Allen v. Crofted*, 7 *Coen*, 48. *Plumb v. M'Cre*, 12 *Johns. R.* 481. *Griswold v. Ridgwick*, 1 *Wendell*, 136. *Coburn v. Hopkins*, 4 *Wendell*, 577.

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and a refusal on his part, lawfully use as much force as was necessary to put him out, and the defendant could not lawfully resist him. The jury found a verdict for the plaintiff for 20 dollars. The counsel for the defendant tendered a bill of exceptions to the opinion and charge of the court, on which a writ of error was brought to this court.

The cause was submitted to the court without argument.

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THOMPSON, J., delivered the opinion of the court. The question arising out of the bill of exceptions in the court below is, whether the testimony offered by the defendant, to show he had a right to enter and occupy the room in the house of the plaintiff below, where the assault and battery was committed, was improperly excluded. The defendant below pleaded the general issue, and gave notice of *son assault demesne*. On the trial, the plaintiff proved, that he ordered the defendant out of his house, and on his refusing to go, gently laid his hands upon him to remove him. The defendant resisted, and struck the plaintiff. And to rebut this, the defendant offered the evidence which was rejected. This evidence ought to *have been admitted. No possible objection could lie to its being received, in mitigation of damages; but it would have been proper to rebut the *molliter manus*, set up by the plaintiff. The case does not fall within the rule in actions of trespass, that a license to enter cannot be given in evidence under the general issue. *Son assault* is a plea of justification, charging the plaintiff with having committed the first assault; and proving that fact would exonerate the defendant, unless the resistance was carried further than the necessity of the case required. If the defendant had pleaded *son assault*, instead of giving notice of it under the general issue, and the plaintiff intended to avail himself of the *molliter manus*, he must have replied specially; for he could not give it in evidence, under the general replication *de injuria sua propria*. (*King v. Phippard*, Comb. 288. 20 Vin. 440. *Esp. Dig.* 317.) *Son assault* being set-up by way of notice under the plea, the plaintiff had no opportunity of replying, and must, necessarily, under such pleadings, be allowed on the trial, to give evidence of *molliter manus*. And if so, the defendant ought to be admitted to meet and rebut this evidence, by showing that the plaintiff had no right to remove him from the house.

There was another error assigned, which, although not necessary for the decision of this case, it may not be amiss to notice. It is, that the declaration does not charge the assault and battery positively, but by way of recital, each count commencing with, *For that whereas*. This might have been a good objection on special demurrer. And, indeed, in many of the old cases in the K. B., judgments have been arrested for that cause. In the C. B., a different rule prevailed. But in more modern cases, both in the K. B. and C. B., this defect has been

held to be cured by the verdict. (2 Ld. Raym. 1413. 2 Wils. 303.) In the case of *Douglas v. Hall*, (1 Wils. 99.) *Dennison, J.*, said, that the *quod cum* might be rejected, as surplusage, after verdict. And the same opinion was *given, upon full consideration, by the Supreme Court of *Massachusetts*, in the case of *Coffin v. Coffin*. (2 Tyng's Mass. Rep. 358.) There is no weight, therefore, in this objection; but upon the other ground, the judgment must be reversed.

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v.
STONE.

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Judgment reversed.

THE FIRST RELIGIOUS SOCIETY IN WHITESTOWN against STONE.

THIS was an action of *assumpsit*, tried at the *Oneida* circuit, in *June*, 1809, before his honor, Mr. Justice *Yates*. The action was brought upon an instrument, not under seal, signed by the defendant, with others, as follows:—

“Know all men by these presents, that we, whose names are hereunder written, being members of the First Religious Society in *Whitestown*, and being desirous of raising a salary for the support of the reverend *Samuel F. Snowden*, as a minister of the gospel in said society, do, in order to carry this our desire into effect, and for the consideration of one dollar received of the trustees of the said religious society, to our full satisfaction, before signing this instrument, promise, covenant, and engage, each one for himself, individually and severally, to and with the said trustees, that we will each one pay, or cause to be paid, unto the said trustees, or such person or persons as they shall appoint to receive the same, such sums as are respectively annexed to each of our names, to be paid annually in each and every year, so long as the said reverend *Mr. Snowden* shall administer the gospel in said society, and so long as we the subscribers shall reside within four miles of the *meeting-house in said society, to be by the said trustees applied for the sole and only purpose of paying the salary of the said reverend *Mr. Snowden*. And it is further agreed by us, the subscribers, that the first annual payment shall be made at the expiration of one year after the said reverend *Samuel F. Snowden* shall

Where the members of an incorporated religious society subscribed a written agreement with the trustees of the society, by which they individually engaged to pay to the trustees, or such person as the trustees should appoint, the sums set opposite their respective names, for the purpose of raising a salary for the support of S. a minister of the gospel, to be paid annually, so long as S. shall administer the

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gospel in the said society, and so long as the subscribers should reside within four miles of the meeting-house in said society,

&c. It was held that this was a valid contract, in law, and binding on the subscribers, so long as S. continued to administer the gospel, and the subscribers to reside within the distance of four miles; and could not be dissolved but by mutual consent, nor cease to be obligatory, until the minister ceased to render the service stipulated. (a)

(2) Vid. *Defendorf v. Reformed Calvinist Church*, 20 Johns. R. 12. *Albany Dutch Church v. Brajard*, 8 Cowen, 457

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be installed or ordained in the said society, and in each and every year thereafter. And now it is the true meaning of us the subscribers to this instrument, that the same shall not be obligatory on us in any manner, until the whole sum subscribed shall amount to the sum of four hundred and fifty dollars. In testimony whereof," &c.

At the trial, the signature of the defendant, and the amount of his subscription of five dollars *per annum*, were admitted. The plaintiff proved, that Mr. *Snowden* had been regularly installed, as a minister of the gospel in the said society, on the 8th of *September*, 1802, and that he had regularly and steadily administered the gospel in the said society from that time till the present, and was still a minister of the gospel in the society. That the defendant, at the time of his subscription, and ever since, had resided within four miles of the meeting-house in the said society, and that the sum of four hundred and fifty dollars was subscribed to the said instrument, previous to the installation of Mr. *Snowden*; that the sum of five dollars was due from the defendant on the 9th of *September*, 1808, which remained unpaid upon the said subscription, and for which the present action was brought.

The defendant's counsel moved for a nonsuit, on the ground that no legal obligation existed, on the part of a subscriber, for the support of a minister; but the same depended wholly on the will of the subscriber; and that the instrument recited was inoperative as to the defendant; but the judge overruled the motion.

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Several witnesses were then sworn, on the part of the *defendant, to prove that the trustees of the said society had not, during several years, been regularly elected.

The plaintiff then gave in evidence an exemplification of "an act relative to the First Religious Society in *Whitestown*," passed the 8th *April*, 1808, as follows:—

"Be it enacted, &c. that the various provisions contained in the act entitled, An act relative to the first Congregational church in the town of *Bridgewater*, passed the third day of *April*, one thousand eight hundred and seven, shall be and are hereby extended to the First Religious Society in *Whitestown*, any omission to supply vacancies in the trustees of the said society notwithstanding."

The plaintiff also read in evidence the act entitled, "An act relative to the First Congregational Society in the town of *Bridgewater*," passed the third day of *April*, 1807:—

"Whereas the trustees of said society, by their petition presented to the legislature, have represented, that the society have, since their incorporation, omitted to fill up the vacancies in the board of trustees, until after the time prescribed by law for filling the same had expired, and have prayed relief in the premises. Therefore,

"Be it enacted, &c. that all acts done by the said trustees

in relation to the said society for their incorporation, shall, to all intents and purposes, be as valid as if the vacancies in the board of trustees had been settled on the day prescribed by law for that purpose, and that all grants made to, and all contracts made by and with the said trustees, shall, in every respect, be as valid as if they had in all things complied with the law in relation to filling up the vacancies in the board of trustees; and the said religious society is hereby restored to all the rights they may have lost by the omission to fill the vacancies as required by law."

Upon this evidence, the judge directed the jury to *find for the plaintiff; and the jury found a verdict accordingly.

On a case containing the above facts, a motion was made to set aside the verdict, which was submitted to the court without argument.

Per Curiam. The contract was valid in law. It was made with a corporation competent to contract. The consideration was the preaching of the gospel by the reverend Mr. Snowden; and as long as he continued to administer the gospel, and the defendant to reside within the specific distance, so long was the defendant bound by his contract. It could not be dissolved but by mutual consent, nor cease to be obligatory, until the minister ceased to render the service. Thus, in the case of *Martyn v. Hind*, (*Doug.* 142. *Cowp.* 437.) it was held, that if a rector appoint a curate of a parish, and undertakes to continue him, and allow him a salary till he shall be otherwise provided with some ecclesiastical preferment, or lawfully removed, he cannot be removed without cause; and as long as the rector continues rector of that parish, he is bound to pay the salary; and if it be in arrear, the curate may recover it, in an action of *assumpsit*. Lord *Mansfield* said, that if the curate was not enabled to do the duty, the rector would be excused from paying him the salary; for the service as curate was not only the consideration, but the condition of the salary. The promise in that case was in writing, not under seal, like the subscription in this case. A similar decision was long before made in the case of *Taylor v. Gay*. (1 *Sid.* 409.)

The act of the legislature, of the 8th of April, 1808, removed any objection, if any valid one before existed, as to the validity of the title of the trustees for the time being. The motion on the part of the defendant to set aside the verdict is denied.

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SPENCER
v.
RICHARDSON.

*SPENCER *against* RICHARDSON.

A person in prison on execution, who has obtained his discharge under the "act for the relief of debtors, with respect to the imprisonment of their persons" (sess. 24. c. 66.) passed the 24th of March, 1801, may, by virtue of the 7th section of the act "to amend the act, for giving relief in cases of insolvency," passed the 8th of April, 1808, (sess. 31. c. 163.) be proceeded against by action of debt, though he was discharged in 1802, previous to the passing of the last act, which provides that he shall not be held to bail, or his body taken in execution on any judgment obtained in such action; and such action is no infringement of the immunity [* 117] vested in him, by virtue of his discharge under the first act. (b)

THIS was an action of *debt*, on a judgment of this court, of *October* term, 1798, for 1,000 dollars of debt, and 14 dollars and 96 cents costs.

The defendant pleaded three pleas: 1. A discharge, as an insolvent debtor, under the insolvent act, on the 23d of *July*, 1804; 2. That the plaintiff sued out a *ca. sa.* on the judgment of *October* term, 1801, returnable at *January* term, on which the defendant was arrested the 9th of *January*, 1802, and kept in custody of the sheriff of *Cayuga*, until he was discharged by the *Cayuga* Court of Common Pleas, in *May* term, 1802, under the "act for the relief of debtors, with respect to the imprisonment of their persons;" 3. That the judgment was rendered upon a bond for 1,000 dollars, conditioned to pay 500 dollars with interest, and that the plaintiff, in *April* term, 1799, sued out a *fi. fa.* on the judgment, on which the sheriff levied the debt and damages, except 225 dollars, of the goods and chattels of the defendant; and this he is ready to verify, &c

There was a *general demurrer* to the *second* plea, and joinder, which was submitted to the court without argument.

Per Curiam. The act of the 31st sess. c. 163. s. 7.(a) provides, that any debtor, discharged under the act mentioned in the plea, may be sued by an action of debt; but he is not to be held to bail, nor shall any execution issue against his body, on any judgment to be obtained in such action. This act cannot then be considered as invalidating the effect of a discharge, declared in the 7th section of the act, (sess. 24. c. 66.) (a) mentioned in the plea. The discharge there was only as to the person, and not as to the property of the debtor; and though that act says, that "no action of debt shall be brought upon such judgment;" and the new act allows of such action, this is no violation of the immunity which had vested in the defendant, seeing that the new act provides, that the defendant may endorse his appearance, and that his body shall not be taken in execution. He cannot then be considered liable to imprisonment, in the new suit, and has no right to consider his privilege impaired. The new suit is only a more effectual means of arriving at the property; and so long as the person of the debtor is not affected, the new remedy was a fair subject for legislative provision and amendment.

Judgment for the plaintiff.

(a) 2 Rev. Stat. 22. s. 30, et seq. Id. 30. sec. 10, et seq.

(b) Vid. *Perbles v. Kittle*, 2 Johns. R. 363. *Raymond v. Merchant*, 3 Cowen, 147.

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Nov. 1810.WHITE
v.
CANFIELD.WHITE *against* CANFIELD.

THIS was an action of debt on a judgment in the Superior Court of the state of *Connecticut*, of *February* term, 1808, for 100 dollars damages, and 50 dollars and 96 cents costs.

The defendant pleaded; 1. *Nil debet*; 2. Reciting the *insolvent* act of *Connecticut*, by which the insolvent may petition the Supreme Court, and assign over his property; and commissioners, appointed by the court, are authorized, on his making a full and just disclosure and assignment, to grant him a *certificate*, which shall operate to protect his person from arrest and imprisonment, for any debt due to any creditor named in his petition; the defendant averred, that being an inhabitant of *Connecticut*, and owing the said judgment, he did, on the 15th of *August*, 1809, petition, &c., that he was adjudged insolvent, and that the commissioners appointed did, on the 1st of *September*, 1809, give him a *certificate*, stating, that he had made the due assignment; wherefore, he prayed judgment, &c.

*The plaintiff replied, protesting, 1. That the plea was bad in law; 2. That no such proceedings were had, &c., and for plea said, that the cause of action, for which the judgment was rendered, arose in this state, where both the plaintiff and defendant resided; and that the plaintiff ever was and still is an inhabitant of this state; that he did not appear to oppose or consent to the proceedings under the insolvent act in *Connecticut*; nor was he party or privy thereto; and this he is ready to verify, &c.

To this plea there was a general demurrer and joinder; and the same was submitted to the court without argument.

Per Curiam. The certificate granted to the defendant, in *Connecticut*, was not a discharge from the *debt*, but only from imprisonment. It was, therefore, limited in its object, and local in its effect. The case of *James v. Allen*, (1 *Dallas*, 188.) is analogous; a discharge from imprisonment in *New-Jersey* was held to be no bar to a suit on the same demand in *Pennsylvania*. It is clearly no bar to an action here upon the judgment.

In the case of *Smith v. Spinolla*, (2 *Johns. Rep.* 198.) it was decided, that though it be shown that the body of the defendant could not be arrested in the foreign state, yet, if the debt be prosecuted here, the defendant must submit to the ordinary

A discharge under the insolvent act of the state of *Connecticut*, by which the person of the debtor is protected from arrest and imprisonment, for any debt due to any creditor named in the insolvent debtor's petition, is no bar to a suit brought by any such creditor against such debtor, in this state.

Such discharge is limited to the person only, without dis-

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charging the debt; and is local in its effect.
(a)

(a) Vid. *Peck v. Hoxier*, 14 *Johns. R.* 346. *Sicard v. Whale*, 11 *Johns* 194. *Ogden v. Saunders*, 12 *Wheaton*, 213.

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v.
SIMMONS.

remedies, provided for the creditor by our law. Judgment must, accordingly, be for the plaintiff.

Judgment for the plaintiff. (a)

(a) Citizens of the same state, entering into a contract, are held to do so with reference to the existing laws of that state, and tacitly to consent to the modification of their contract by those laws. *Mather v. Bush*, 16 Johns. R. 233. This is universally true, unless the contract is to be performed in some other state, when the law of the place of performance must govern the construction. *Hicks v. Brown*, 12 Johns. R. 142. While, therefore, an insolvent may avail himself of his discharge under the laws of the place of contract existing at the time of the contract, he cannot, in a suit thereon, in a different state, plead in bar a discharge under the laws of the latter, though both parties have previously removed within its jurisdiction. *Witt v. Follett*, 2 Wendell, 457. *Hicks v. Hotchkiss*, 7 Johns. Ch. R. 297. *Penniman v. Meigs*, 9 Johns. R. 325. cont. And see *Sherrill v. Hopkins*, 1 Cowen, 103. *Wyman v. Mitchell*, Id. 316. But an insolvent discharge, which simply exempts the person from imprisonment, relates to the remedy merely, not to the contract, and is of no force in another state. *Whittemore v. Adams*, 2 Cowen, 626.

[*119] *BEECKER against SIMMONS, impleaded with ANDREWS.

Where the plaintiff takes an assignment of the bail-bond, and brings an action against the principal, and the bail to the arrest, and obtains a judgment, and issues an execution, he cannot afterwards file common bail in the original suit, and proceed to judgment thereon; but is concluded by his election to proceed on the bail-bond.

THIS was an action of debt on a judgment.

The plaintiff sued *Simmons & Andrews* on their joint note. *Andrews* only was arrested, and put in bail to the sheriff; but neglecting to put in *special* bail, the plaintiff took an assignment of the bail-bond, on which he brought an action, and obtained judgment. The suit on the bail-bond was against *Andrews*, and one *Asa Gunn*. Upon this judgment the plaintiff issued a *ca. sa.* in which both defendants, in the bail-bond suit, were taken and committed to custody. After remaining some time in custody, they left the gaol-liberties, and returned home. The plaintiff filed common bail in the original action, and entered up a judgment against both defendants, and brought an action of debt on that judgment, in which *Simmons* only was taken.

Upon these facts, two questions were submitted for the decision of the court:—

1. Whether the plaintiff, having elected to take an assignment of the bail-bond, and proceeded to judgment thereon, could afterwards file common bail to bring the defendants into court.

2. Having taken the bail in execution, is not that a satisfaction of the debt?

Per Curiam. The plaintiff having elected to proceed upon the bail-bond to a judgment, and having charged the bail to

the arrest and his principal in execution, he cannot be permitted, afterwards, to waive these proceedings by filing common bail in the original suit, and proceeding to a judgment therein. He is concluded by his election, and the proceeding under it. The remedies are inconsistent with each other; and he cannot have both. That would be oppressive. *The case comes within the principle of the decision in *Smith v. Rosencrantz*, (6 *Johns. Rep.* 97.) for the bail to the arrest became substituted for special bail. The filing of common bail in the original suit was irregular, after the judgment and execution upon the bail-bond; and no doubt the court, on proper application, would have set aside, as irregular, the judgment upon which this suit was brought. But that question is not now before us; and upon the first point submitted, we are of opinion with the defendant; and, according to the stipulation in the case, judgment is to be entered accordingly.

Judgment for the defendant.

GENET *against* MITCHELL.

THIS was an action for a *libel*. The declaration contained three counts. The second count was abandoned at the trial. The first count charged the defendant with publishing, on the 26th March, 1807, in a newspaper, called "*Republican Crisis*," at Troy, in the county of *Rensselaer*, a "false, scandalous and malicious *libel*, of and concerning the plaintiff," which (omitting the innuendoes and averments) was as follows:—

"Genet is on the alert in *Rensselaer*. He is determined to put down his enemies, and make them bite the dust. He intends his committee of vigilance shall cover themselves with glory. Thus he will deserve well of the faction, receive the due consideration of the first consul, and be made one of the legion of honor."—"It is said, that the *French* government have a spy in every nation on earth, who, by giving information of the *strength, measures and movements of those governments, and thus aid the emperor in his numerous subjugations and conquests. If this be the case, who is the spy?"

The third count charged the defendant with publishing a libel in the same paper, on the 16th March, 1807, in the following words: "This charge is the offspring of some *French* jacobin, who, with the versatility peculiar to his cast, has,

betrayed the secrets of his government," and the proof was, that he had published his instructions; it was held, that a public minister may, if he deems it necessary, publish his instructions; and whether, by such publication, he had traitorously made known the secrets of his government, is a mixed question, on which a jury, in this action, under the advice of the court are to decide.

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In an action for a *libel*, the plaintiff, at the trial, may abandon any part of the libellous matter in any one count in his declaration, and the part so abandoned may be used in connection with the part retained, to show its meaning, and he will be entitled to recover, if the part retained be sufficient to sustain an action.

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Where the libel charged the plaintiff, who had been a minister of France to the United States, with having "traitorously

instructions; it was held, that a public minister may, if he deems it necessary, publish his instructions; and whether, by such publication, he had traitorously made known the secrets of his government, is a mixed question, on which a jury, in this action, under the advice of the court are to decide.

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perhaps, converted himself into an emissary of *Bonaparte*. The county of *Rensselaer*, I am told, does harbor such a one, who, on a former occasion, strived to sow sedition among us, lighted a flame which required all the energies of our *Washington* to extinguish; and to prevent its scorching his own skirts, traitorously betrayed the secrets of his own government. Our countrymen would do well to be on their guard against such incendiaries;" meaning, &c.

The defendant pleaded the general issue, with notice of special matter to be given in evidence, by way of justification.

At the trial, the defendant was admitted to be the editor and publisher of the paper containing the alleged libel. A witness testified, that the words "*Genet*," and "*French emissary*," in the first paragraph, meant the plaintiff; and that he understood the charge "*spy*," in the other paragraph, taken in connection with the preceding article, applied to the plaintiff; but if the paragraph containing the word "*spy*" was not taken in connection with the preceding article, he should not know who to apply it to; that he understood that "*Bonaparte*" meant the emperor of *France*; that he understood the words "*French jacobin*" to mean the plaintiff; and that his understanding of the application of these words, in the alleged libel, to the plaintiff, was founded principally on matters of public notoriety, which he had heard, as to the plaintiff's conduct and proceedings, while he was the *French* minister near the *United States*.

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It was admitted, that the plaintiff was minister of the *French* republic, as stated in the declaration; and the defendant, in order to make out his justification, set forth in the notice subjoined to his plea, in relation to the seditious conduct of the plaintiff, while he was minister of *France*, offered to read in evidence the deposition of *Thomas Jefferson*, and a pamphlet containing the correspondence between the plaintiff, while *French* minister, and Mr. *Jefferson*, then secretary of the *United States*, the plaintiff's attorney having consented that the pamphlet should be entitled to the same credit, as the original letters which passed between the plaintiff and Mr. *Jefferson*.

It was objected to the admission of this evidence, that the defendant's notice did not state, with sufficient precision, the seditious acts, &c., on which the defendant meant to rely. The plaintiff's counsel, after some discussion, stated to the judge, that they abandoned all the libellous matter set forth in the declaration, except the second paragraph in the first count, which, it was alleged, charged the plaintiff with being a "*spy*" of *Bonaparte*, and, excepting the charge in the last count, that the plaintiff had traitorously betrayed the secrets of his own government. It was then submitted, on the part of the defendant, whether such an abandonment could be made by the plaintiff; and the judge being of opinion that it might be done, the plaintiff's counsel declared that he aban-

done all the libellous matter, except as above-mentioned, upon which the evidence offered by the defendant, as to the other matters, was held irrelevant.

The defendant, by consent of the plaintiff's counsel, read in evidence, a letter from the plaintiff to Mr. *Jefferson*, accompanying the plaintiff's instructions, &c., as *French* minister, contained in a printed pamphlet, announcing *the publication of those instructions by the plaintiff, in such printed pamphlet.

It was admitted, that the plaintiff was recalled and superseded, as *French* minister, at the request of the president of the *United States*, in the commencement of the year 1793; and that the plaintiff, in *December*, 1793, published his instructions.

The plaintiff also gave in evidence two decrees, dated at *Paris*, 7th *Fructidor*, 7th year of the *French* republic, showing that his name had been erased from the list of emigrants, and his property, which had been sequestered, ordered to be restored, and by which he was enjoined to return to *France*, within three months after notice of those decrees.

The defendant's counsel contended, that the charge of spy, as stated in the declaration, was not warranted by the supposed libel, nor were the innuendoes and averments proved; and that the remaining supposed libellous matter relied upon by the plaintiff, was fully justified. The judge charged the jury, that in his opinion, the plaintiff was entitled to recover on the first point; and as to the second point, he thought the defendant had made out a strong defence, but he left it to the jury, on the evidence before them, to find such verdict as they should deem just. The jury found a verdict for the plaintiff for 200 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

Sudam and *Van Vechten*, for the defendant. The plaintiff, at the trial, abandoned the whole of the publication charged as libellous, in the first and second counts, except the second paragraph of the first count, and rested himself on the abstract term "spy." The word occurs in a distinct paragraph. It is an important *question, whether the plaintiff can, after stating a variety of facts, in his declaration, as libellous, and the defendant comes prepared to meet the whole charge, be permitted to separate the facts, and rely on one distinct fact, as libellous, when there might be a clear and complete justification of the whole, taken together. If the other paragraphs are struck out, the charge of spy is clearly not libellous. Where two countries are in a state of amity and peace with each other, to charge a citizen of one, with being a spy in the other, is not libellous.

There are no averments, in the declaration, to help out the charge, or to show it libellous. There is nothing in the libel that will apply the words to the plaintiff. It is too vague and

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uncertain, to admit of a particular application. There must be a *colloquium*, as to extrinsic matter, to show the necessary inference, or application, as to the plaintiff. (*Courp.* 688. 1 *Johns. Rep.* 286. 5 *Johns. Rep.* 211. *Chitty's Pl.* 382, 383. 8 *East*, 431. *Cro. Eliz.* 497. 5 *State Tr.* 590. 4 *Co.* 20. 9 *East* 95.)

The extraneous matter, in the present case, is in the first paragraph. The plaintiff having entered a *nolle prosequi*, as to the second count, and the first paragraph of the first count, it operates as a complete extinguishment of the matter so abandoned. The case stands, as if the paragraphs, so relinquished, were erased from the record. Having abandoned the first paragraph, without any qualification, or reservation, it must be entirely rejected. Then the second paragraph stands alone, without any thing from which it can possibly be inferred that the plaintiff was intended. Admitting that the plaintiff may abandon any count, or part of it, he cannot, afterwards, resort to the part abandoned, to explain the residue.

If the plaintiff meant to make use of the first paragraph to explain the second, he should have retained it, with a *colloquium* or proper averments; but he has totally and absolutely abandoned it; and he cannot now retain it, for any purpose whatever. No principle is better or *more clearly settled, than when the language of a libel is too uncertain to admit of any application to the plaintiff, without the aid of extrinsic matter, such extrinsic matter must be introduced with proper averments.

If the *innuendo* could have been proved, it has not, in fact, been proved. There is no averment, that *Bonaparte* was at war with the *United States*, or that he meditated their subjection; how, then, could the plaintiff be permitted to prove that fact? and without it, the charge of being a *spy*, &c., could not be libellous. A material *innuendo* or *averment* cannot be rejected.

Then, as to the second libel, stated in the third count, the defendant made out a complete justification, from the printed papers, furnished by the defendant, and lodged in the office of the secretary of state. It is admitted, that instructions to ministers are secret; that the plaintiff's instructions were so; and it was proved, that he published those instructions; that he wilfully and treacherously betrayed the secrets of his government.

A minister has no discretion to publish the secret instructions of his government. They are never made public, without the authority or permission of his government.

Again, the jury were misdirected. If the matter abandoned by the plaintiff was rejected, he could not be entitled to recover on the first count.

It is a question of law, whether the instructions of ministers are secret, and can be published, without betraying the secrets of government. The judge should have decided the law, on

this subject, and not have left it to the jury. If the plaintiff was entitled to recover at all, on the first count, on the charge of being a spy, it could only be as for a term of reproach and odium, and the jury should have been so instructed, as the damages would, in that case, have been much less.

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**Foot and Russell, contra.* It is well settled, that the plaintiff may, at *nisi prius*, relinquish any one count in his declaration, or any part of a count. (1 *Saund.* 207. note 2.) The plaintiff abandoned the first paragraph of the first count, merely as *libellous* matter; and there is no reason why he may not use it, afterwards, with the other paragraph, to show its meaning. The plaintiff is not bound to prove the whole of an *innuendo*. What is not necessary to support the action, may be rejected, as surplusage. (9 *East*, 93. *Roberts v. Camden.*) It is sufficient, if enough is shown to entitle the plaintiff to recover.

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Though the defendant is not charged with being such a spy as, by the law of nations, would subject him to the punishment of death; yet the character of a *spy* is imputed to him, in an odious and injurious sense. Any charge, in writing, which tends to injure the reputation of the plaintiff, and degrade him in public estimation, is libellous. (a) It is admitted, that this was a question of law for the judge to decide; and he did decide it. His charge was in favor of the plaintiff, on the first count, and in favor of the defendant, on the third count; and he finally left the whole matter to the jury. The defendant has, then, no reason to complain of the charge of the judge.

The libellous matter in the third count was fully proved. Did the defendant make out a justification? Did he prove that the plaintiff had *traitorously* published the secrets of his government? Admitting that his instructions were secret, he had a right to publish them whenever he thought it necessary. He could not be compelled to do it; but he might exercise his discretion as to publication. (*Wicq. Amb.* 165. 168.) *Wicquefort* states, that ambassadors have the power to publish their instructions, whenever they judge it necessary for the interest of their government. And the same doctrine is laid down by *Robinet*, in his *Universal Dictionary*. (*Rob. Dict. Univ.* vol. 22. p. 387. 590.) Various instances are given by *Wicquefort*, of ministers having published their instructions; and we have frequent examples of such publications, in modern times. Mr. *Wickham*, the *English* minister in *Switzerland*, published his instructions, to contradict the suggestion that he was employed against the *French* republic. The same thing was done by Mr. *Drake*, in *Bavaria*, to repel the charge of the *French* government. M. *Ternant*, the predecessor of Mr. *Genet*, offered to Mr. *Jefferson*, to file his instructions in the office of the secretary of state, to refute the charge, that he was directed

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(a) Vid. *Steele v. Southwick*, 9 *Johns. R.* 215. *Root v. King*, 7 *Cowen*, 613.

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by his government, to do every thing in his power to check the commercial prosperity of the *United States*. Mr. *Monroe*, after his return from *France*, published his instructions, in vindication of his own conduct and reputation. Mr. *Genet* had a right to publish his instructions, to vindicate himself from a charge, that he had betrayed the secrets of his own government. If, then, a minister has a right to use his discretion, in that respect, this court cannot decide on the question, as to the abuse of that discretion. It is a matter altogether between him and his own government. The judge very properly left it to the jury, as a matter of fact, whether the plaintiff had *treacherously* disclosed his instructions, or betrayed the secrets of his government.

YATES, J. A new trial was moved for, on the following grounds:—

1. That the first libel set forth in the declaration is not supported by proof.
2. That the libel stated in the other count was justified.
3. That the jury were misdirected by the judge.

This cause was tried under the qualified abandonment, as stated; to which objections have been raised in the argument. I consider the doctrine laid down in 1 *Saund.* 207. n. 2. as the law on the subject, and that the exception is incorrectly taken. The course adopted by the plaintiff was proper; and it was competent *to him to abandon part of the libellous matter, in any one count, provided the part relied on contained sufficient to sustain the action; and as evidence of this, the judge correctly admitted the whole publication containing the libellous matter.

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I do not think the case requires a very minute or extensive examination of the rules of pleading or of evidence, applicable to an action for a libel. These are so fully laid down in the books, and particularly in the famous case of *The King v. Horne*, in *Cowper*, recently recognized by this court, in the case of *Van Vechten v. Hopkins*, as to render a repetition of the law on the subject unnecessary. I shall confine myself to an application of some of the principles thus established, to the facts disclosed in this cause.

It cannot seriously be contended, that the words relied on in the first and third counts, in themselves, are not sufficiently explicit to be well understood; and that, on account of their vagueness and uncertainty, they are not actionable.

The allusion to the plaintiff, in the first part of the publication stated in the first count, is evident, and does not leave a doubt that he was the person intended; yet as it might possibly require an explanation, the testimony adduced gives such explanation, and wholly removes the ambiguity, if any can be supposed to exist; nor is this paragraph susceptible of a construction different from the one given to it by the witness; that by *Genet*, the *French* emissary, was intended the plaintiff

in this cause; that the charge of *spy*, in the next paragraph, if taken in connection with the preceding article, must be applied to the plaintiff, and that *Bonaparte* meant the emperor of *France*.

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The paragraph containing the charge of *spy*, immediately follows the animadversions on the plaintiff's conduct; and, from the manner in which it is introduced, no room is left to doubt that this charge was intended to apply to *him. It is in vain to say that this might be deemed a separate or distinct paragraph, disconnected with the former part of the publication. It must and will irresistibly be taken in connection, and the meaning and true construction necessarily follows, which manifestly charges the plaintiff with being a *spy* of the *French* government; giving information of the strength, measures and movements of the government of the *United States*, to aid the emperor of the *French* in subjugating them; and, consequently, representing the plaintiff in an odious, if not in a criminal, point of view; and, according to the rules of law, libellous in either case. The objection, therefore, to the insufficiency of the proof, as to the first libel set forth in the declaration, cannot be sustained.

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I shall now proceed to an examination of the alleged justification of the libellous matter relied on in the 3d count; *that the plaintiff had traitorously betrayed the secrets of his own government*. To justify this charge, the defendant proved, that the plaintiff had published his instructions as minister, and that his name had been on the list of proscribed emigrants.

It could not be pretended, nor was it attempted, that the plaintiff had not incurred the displeasure of the executive directory of *France*, and had been proscribed. The cause of this proscription does not appear. That its existence, at the period stated, ought to be deemed conclusive evidence of the alleged treachery to his government, I cannot admit. The plaintiff might have published his instructions, without being subjected to such a charge. It might have been done by him to repel improper accusations, or in exercise of a sound discretion, given him by the power he represented, and not unfrequently extended to persons holding the important office he held under that government. Nor is it unreasonable to infer, that this discretion, in some measure, existed, as the instructions stated that the abandonment of this cautious or (as translated by some) secret policy depended on *future occurrences; and was to be pursued or not, according to the plaintiff's own judgment. The proceeding of the executive directory, subsequent to the publication of those instructions, do not prove treachery in the plaintiff. It is a fact, too well attested, that many innocent persons have fallen victims to the measures of that extraordinary tribunal. How far the publication of those instructions operated as treachery to his own government, the jury were to decide; and it was properly submitted

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to them by the judge, with his opinion, that a strong defence had been made out; giving to the defendant a full opportunity to receive the effect of his justification, which the jury, no doubt, have considered, and their verdict ought not now to be disturbed. A new trial must, consequently, be refused.

THOMPSON, J., and VAN NESS, J., were of the same opinion.

KENT, Ch. J. I am also of the same opinion. I will only add, on the second point, that whether the defendant had made out a justification of the charge that the plaintiff had traitorously made public his instructions, was a mixed question properly submitted to the jury, under the advice of the court. The fact cannot be said to be, *per se*, traitorous. These instructions are understood to be confidential and secret; but it does not follow, that they are to remain so in every possible case. The fitness or the fraud of the disclosure will depend upon the motive and the circumstances attending the publication. This seems to be the better opinion of the writers cited by the counsel for the plaintiff, and who treat particularly upon this branch of the diplomatic duties. *Wicquefort* (*L'Ambassadeur*, tom. 1. s. 14.) says, that the ambassador is not obliged to show his instructions to the foreign court; and he even maintains, that he ought not to show them without necessity, and without an express order. If necessity forms an exception to the general rule, the ambassador must be left to judge of its force; and no prudent minister would readily yield to it without strong reasons, sufficient to procure the approbation of his sovereign. In the *Dictionnaire Universel of Robinet*, (tom. 22. tit. *Instruction*, s. 3.) it is stated, that sometimes the ambassador shows his instructions without order; but this, as it is there observed, ought to be the work of reason and of choice, and for some justifiable end. *Martens*, in his *Summary of the Law of Nations*, (p. 217.) is equally explicit. He says, that the instructions to the minister are not usually produced to the court where he is sent, unless his own court orders him to do it, or unless he, from urgent motives, thinks himself justifiable in communicating certain passages of them; and that *Les Memoires du Compte d'Arax* furnish a number of examples of such communications, and the matter is left to the discretion of the minister. *Wicquefort* refers to a number of specimens of these state papers, which had been made public, probably, after the negotiations had terminated; and it ought to be observed, in the present case, that when the plaintiff published his letter of instructions, his functions, as minister, had terminated, or were about to cease. The criminality or innocence of the act will, then, depend altogether upon the intent with which it was done. This is one of those cases in which we may apply the maxim, that *actus non facit reum nisi mens sit rea*. The more natural inference from the facts

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before us is, that the plaintiff published his instructions without any criminal views, and merely to vindicate his official conduct. His object was to prove his fidelity in his trust, and not to betray the essential interests of his government. I think the jury were warranted in drawing this conclusion. The act may have been ill advised or injudicious, without being chargeable with perfidious motives. Nor does it appear, that the *French* government ever considered this act of the plaintiff as ground for any specific charge or complaint.

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Nov. 1840.

TUTTLE
v.
MAYO

*SPENCER, J., not having heard the argument in the cause, [* 132]
declined giving an opinion.

Motion denied.

TUTTLE against MAYO.

THIS was an action of *assumpsit*. The declaration contained five counts. The first was on a special agreement, for that whereas the defendant, on the 28th of July 1808, at, &c., in consideration that the plaintiff, at the special instance and request of the defendant, would cause to be delivered to the defendant 36 barrels of pork, on sale, or to return the same to the plaintiff, when thereto afterwards requested, the defendant undertook, &c., to return the said 36 barrels of pork to the plaintiff, when thereunto requested, or otherwise the defendant would be the buyer thereof, or be accountable to the plaintiff for so much as should not be returned, at the price of 21 dollars per barrel, saving to himself 12½ per cent. for selling, and would pay to the plaintiff the said 21 dollars per barrel for the same, &c. The plaintiff averred the delivery of the pork, pursuant to the agreement, and that the defendant did not, afterwards, when requested, &c., return the 36 barrels of pork, or any part thereof, &c. The *second* and *third* counts were for goods sold and delivered; the *fourth*, for money paid, &c., and the *fifth*, for money had and received to the use of the plaintiff.

Where the plaintiff declares on a special agreement, and attempts to recover thereon; but fails altogether, he may recover on a general count in his declaration, if the case be such, that if there had been no special agreement, he might have recovered on a general count, as for money had and received. (a)

It is not necessary, in all cases, to give positive evidence that the defendant has received money belonging to the plaintiff; but where.

To the first four counts, the defendant pleaded *non assumpsit*,

from the facts proved, it may fairly be presumed the defendant has received the plaintiff's money, the plaintiff may recover for money had and received to his use. (b)

(a) Acc. *Linnindale v. Livingston*, 10 Johns. R. 36. *Burdick v. Green*, 18 Johns. R. 14. *Dubois v. Delaware and Hudson Canal Co.* 4 Wendell, 285. *Jewell v. Schroepfel*, 4 Cowen, 504. But while the special agreement remains unrescinded or unperformed, there can be no recovery under the common counts. *Jewell v. Schroepfel*, ut sup. *Champlin v. Butler*, 16 Johns. R. 169. *Wood v. Edwards*, 19 Johns. R. 205. *Clark v. Smith*, 14 Johns. R. 326. *Jennings v. Camp*, 13 Johns. R. 94. *Raymond v. Beardsley*, 12 Johns. 274. *Miller v. Watson*, 4 Wendell, 267.

(b) Vid. *Beardsley v. Root*, 11 Johns. R. 464. *Cumming v. Hackley*, 8 Johns. R. 292.

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and gave no answer to the fifth, on which a default was entered. The jury were authorized to assess the damages on the fifth count, as well as to find the truth of the issue joined on the other counts.

*The plaintiff produced the receipt of the defendant for 36 barrels of pork of the plaintiff, dated the 18th of *July*, 1808.

It was proved, that the defendant had admitted that 6 barrels had been left with one *Corbin*, to be sold; that 10 or 12 had been delivered to the plaintiff's order, and that 18 remained in the defendant's possession. Four of the barrels left with *Corbin* were returned to the plaintiff, and the other two were sold.

The defendant's counsel moved for a nonsuit, on the ground, that the evidence did not support the first count on the agreement, but the motion was overruled by the judge. It was admitted, that the plaintiff was entitled to recover 37 dollars, for the two barrels sold, under the fifth count. The judge charged the jury, that the plaintiff was entitled to recover for the 18 barrels not returned, at the rate of 21 dollars, deducting 12½ per cent. commissions on the amount, with the interest, from the 21st of *March*, 1809; and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge. The case was submitted to the court without argument,

Per Curiam. On the trial, the plaintiff gave in evidence the defendant's receipt, for 36 barrels of pork, in store, to be delivered to the plaintiff's order; no other evidence was given in support of the special count. But from the evidence it appeared, that part of the pork had been sold; and the money was in the defendant's hands. With respect to another part of the pork, though there is no direct evidence that the defendant sold it, the inference is irresistible that he had sold it, and had the money in his pocket.

[* 134] There is some contrariety in the books, on the question, whether a plaintiff, after having attempted to support a count on a special agreement, and failed, may resort to *the general counts? We think the rule laid down by Sir *James Mansfield*, in 1 *Bos. & Pull. N. S.* 355. is correct and accurate, and therefore adopt it; it is this, where a party declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general count, if the case be such, that supposing there had been no special contract, he might still have recovered. In this case, the plaintiff failed wholly in making out a special agreement, and under the count for money had and received, the evidence entitled him to recover.

It is not necessary, in all cases, to give positive evidence, that the defendant had received money belonging to the plaintiff. Where, from the facts proved, it may be fairly presumed he has

received the plaintiff's money, the action for money had and received is maintainable. (*Doug.* 137.)

The verdict is perfectly just; and unless some legal principles have been violated, and we think none have been, there ought not be a new trial.

Motion denied.

NEW-YORK.
Nov. 1812.

WASHBURN
v.
M'INROY.

WASHBURN, *qui tam*, &c., against M'INROY.

THIS was an action of *debt*, tried at the *Washington* circuit, *June*, 1810, before Mr. Justice *Van Ness*. The declaration contained sixteen counts, for retailing strong and spirituous liquors, to be drank in the house of the defendant, not having any permit, or license, to retail strong and spirituous liquors, for the purpose of keeping an inn, or tavern, contrary to the provisions of the act entitled "An act to lay a duty on strong liquors, and for regulating inns and taverns." (24 sess. c. 164.) [1 *R. S.* 681. sec. 19.] The offences were charged to have been committed on the 4th *July*, 1809, and from day to day, *Sundays* excepted, to the 20th *July*, in the same year. The plaintiff sued under the 7th section of the act, which gives a penalty of 25 dollars for every offence; and by the 16th section of the act, one half of the penalties recovered, are to be paid to the overseers of the poor of the city or town, where the offence happens, and the other half to the person suing for the same. At the trial, the plaintiff produced a witness, to prove the sale of one gill of brandy, at the store of the defendant, which is distinct from, and opposite to, his house, in *Argyle*. The defendant objected to the witness, as incompetent, being an inhabitant of the town of *Argyle*; but the objection was overruled by the judge. The defendant then objected to the plaintiff's proving more than one offence; but this objection was overruled by the judge. The plaintiff then produced witnesses, who proved the sale of liquors, by retail, to five several persons, at several times, which were drank in his store, previous to the 4th *July*, 1809, and on the 4th *July*; and one of the witnesses testified, that he had frequently seen the defendant sell liquors, by retail, during the summer of 1809, which were drank in the defendant's store.

The defendant moved for a nonsuit, which was overruled by the judge, who directed the jury to find a verdict for the plaintiff, for 75 dollars; and the jury found a verdict accordingly.

In an action *qui tam*, on the 7th section of the *tavern act*, (34 sess. c. 164.) for retailing liquors, &c. without a license, the plaintiff, though he states and proves several distinct of [* 135] fences, can recover only one penalty. (a)

(a) *Tiffany v. Driggs*, 13 *Johns. R.* 253. acc. And see *Bigelow v. Johnson*, 13 *Johns. R.* 428

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WASHBURN
v.
FINNEY.

A motion was made to set aside the verdict, on the following grounds:—

1. That the witnesses, being inhabitants of the town of *Argyle*, ought to have been rejected, as interested.

2. That the testimony ought to have been confined to the days on which the offences were charged, in the plaintiff's declaration, to have been committed.

3. That several penalties cannot be joined in one declaration; *and that only one penalty could be recovered.

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Per Curiam. The only points worthy of consideration are, whether the act inflicts more than one penalty for the offence of selling liquors without a license; and, if it does, whether there can be more than one penalty recovered in one action.

The 7th section ordains, if any person shall sell strong or spirituous liquors, by retail, without having such license, or if any person shall sell, &c., to be drank in his house, &c., without having entered into such recognizance, every person who shall be guilty of either of the offences aforesaid, shall, *for each offence*, forfeit 25 dollars. Adopting the principle which guides in the construction of penal statutes, that they are to be construed strictly, the forfeiture of 25 dollars is not incurred for every offence against either of those provisions; but the words *each offence*, used in the section, impose the forfeiture of 25 dollars upon the offence of selling without a license, and also 25 dollars for the offence of selling to be drank in the house, &c., without having entered into a recognizance. The terms "for each offence," in other words, subject the offenders, in either of those cases, to one forfeiture for each of the two enumerated offences.

The 18th section provides, that whenever any suit shall be commenced, *and a recovery had for a penalty*, for selling liquors without a license, such recovery shall be a bar to all prosecutions for offences of the like nature, committed before such recovery.

This section confirms the construction, and shows, that the legislature intended that there should be a recovery for a single penalty only, not only by the words, "and a recovery had for a penalty," but by declaring, that such recovery, that is, a recovery for a penalty, shall be a bar, as to offences committed before such recovery. If a multiplicity of offences can be sued for *in one suit, the protection, afforded by this section of the act, against prosecutions for offences committed before the recovery, is entirely defeated and frustrated.

The court is, accordingly, of opinion, that, at all events, but one penalty is recoverable, in one action, and that recovery bars all antecedent offences. Upon the plaintiff's remitting 50 dollars of his verdict, he may enter up his judgment, for the remaining 25 dollars.

Judgment accordingly

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NEW-YORK,
Nov. 1810.RICHARDS and
others
v.
PORTER.RICHARDS and others *against* PORTER, Sheriff, &c. .

THIS was an action of trespass on the case, against the late sheriff of *Saratoga* county, for the *escape* of one *Philip Rykert*, who was in custody of the defendant, on *mesne* process, at the suit of the plaintiffs. The cause was tried at the *Saratoga* circuit, in *May*, 1810, before Mr. Justice *Van Ness*.

In *February*, 1807, *Daniel Bull*, then sheriff of *Saratoga* county, arrested *Rykert*, on a *capias ad respondendum*, at the suit of the plaintiffs, returnable in *May* term, 1807. *Rykert* was detained in custody by *Bull*, by virtue of the writ, until *March*, 1807, when *Bull* was removed from the office of sheriff, and *Porter*, the defendant, appointed in his stead. The writ was returned *"*cepi corpus in custodia*," by *Bull*; and *Rykert* was duly assigned, with other prisoners, by *Bull* to *Porter*. The assignment was made about the 1st of *March*, 1807. About a fortnight after receiving the assignment of *Rykert*, the defendant, as sheriff of *Saratoga*, took a bail-bond in his own name, from *Rykert* and another, which he deemed sufficient security, and let *Rykert* go at large, without the knowledge or consent of the plaintiffs in that action, and without giving them any notice thereof.

The plaintiffs in that action proceeded against *Rykert*, and recovered a judgment against him in *August* term, 1807, for 354 dollars and 68 cents damages; upon which a *test. ca. sa.* was issued, returnable in *August* term, 1808; and was returned "*non est*," by *Bull*, who was then sheriff of the county; having been reappointed to that office, on the removal of the defendant.

It was proved, that *Rykert* was insolvent.

The jury, by the direction of the judge, found a verdict for the plaintiffs, for six cents damages, and six cents costs, with leave for the plaintiffs to move for a new trial, on the above facts.

The cause was submitted to the court without argument.

Per Curiam. The prisoner *Rykert* was entitled to his discharge from prison, at any time before the return day of the writ, on giving a bail-bond, with competent bail; and the defendant, as sheriff, was bound to let him go, on receiving

In *February*, 1807, a sheriff arrested a person on a *capias ad resp.* returnable in *May* term following, and the defendant was detained in custody, until *March*, 1807, when a new sheriff being appointed, the prisoner was assigned over

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by the old to the new sheriff; the writ, however, was returned by the old sheriff, *cepi corpus in custodia*. Soon after the assignment of the prisoner, the new sheriff discharged him on his giving a bail-bond. The plaintiff had knowledge of the taking of the bail-bond; but proceeded to judgment, and took out a *ca. sa.*, which being returned *non est* *est*, he brought an action against the new sheriff for an *escape*; and it was held, that as the new sheriff was bound to discharge the prisoner at any time before the return of the *capias ad resp.*, on his tendering sufficient bail, he was not liable for an *escape*.

The old sheriff had no right to return the writ, after he was out of office, but should have delivered it to the new sheriff, with the assignment of the prisoner, so that the new sheriff might return it with his endorsement of the discharge of the defendant on bail, by which the plaintiff would have known the situation of the defendant. The new sheriff was not bound to give notice to the plaintiff, of his having let the defendant to bail.

Whether the new sheriff would be responsible in such a case, without a delivery of the writ to him by the old sheriff, *quære?*

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such a bond. (*Laws of N. Y.* vol. 1. p. 210.) [2 *R. S.* 348, sec. 11.] Though the prisoner was turned over to the defendant by the former sheriff, that assignment could not affect his right to be discharged on bail. The defendant was not bound to give notice to the plaintiff of the act of taking a bail-bond, in any other way than by an endorsement upon the writ, and that was not delivered to him. The irregularity was in the old sheriff, in not handing *over the writ along with the assignment of the prisoner. He had no authority to return the writ after he was out of office. He should have delivered it to his successor, and the successor would or ought to have returned the writ into court, with the former sheriff's return thereon, and his own endorsement, stating the fact of having let the prisoner to bail. (2 *Roll. Abr.* 457. C. 1 *Bulst.* 70. *Dalton*, 516. 4 *East*, 604.) This would have been the regular course, and then the plaintiffs would have had due notice of the condition of the party. It is to be presumed from the case, that the writ was specified in the indenture of assignment, as without such notice; at least, the defendant would not have been bound to take or detain the prisoner. (*Dalton*, 15, 16. 3 *Co.* 71.) Whether he was responsible for the prisoner, without delivery of the writ, might also be a question; but that is not an essential point in this case; for, if it be admitted that the defendant was responsible, he did no more than his duty in letting the prisoner to bail, and was only bound afterwards to see that special bail was entered. As no bail was put in, the plaintiff proceeded to a judgment under a mistake, and the judgment was erroneous. The defendant was not answerable at all for an escape, for there was none while he had charge of the prisoner. As, however, nominal damages only are recovered, the defendant makes no objection to the verdict; and the motion on the part of the plaintiff to set it aside, ought to be denied.

Motion denied

NEW-YORK
Nov. 1810PANGBURN
v.
PATRIDGE.*PANGBURN *against* PATRIDGE.

THIS was an action of *replevin*, brought against the defendant, for unlawfully taking and detaining a heifer, belonging to the plaintiff. The defendant pleaded *non cepit*, and that the heifer was his property, &c.

The cause was tried at the *Saratoga* circuit, before Mr. Justice *Van Ness*.

At the trial, the plaintiff proved a regular bill of sale, and delivery of the heifer and other cattle, from *Joseph Pangburn*, to the plaintiff, for the consideration of 100 dollars. While the cattle were in the possession of the plaintiff, the defendant took and drove away the heifer in question, alleging, that he took it for a debt due to him from *Joseph Pangburn*.

The defendant moved for a nonsuit, and the judge decided that the plaintiff could not recover in this form of action. The plaintiff offered further evidence, to show that the defendant had no right or claim of property whatever in the heifer; but the judge, being of opinion that the right of property could not be decided in this action, directed the plaintiff to be called, and he was nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

J. B. Yates, for the plaintiff. *Buller* (*Bull. N. P.* 52.) says, the action of *replevin* may be brought, in any case, where a man has had his goods taken from him by another. Where the person, taking the goods, claims property in them, the sheriff cannot proceed to make *replevin*, but must issue a writ *de proprietate probanda*, on which he has an inquest of office. (*Co. Litt.* 145.) But, though by the inquisition, the *property should be found in the defendant, the plaintiff is not concluded, but may have his action of *replevin*.

The plea of property is inconsistent with the idea of a *distress*.

(a) *Acc. Creason v. Stout*, 17 *Johns. R.* 116. *Replevin* will lie where an action of *tres pass de bonis asportatis*, might be brought. 3 *Wendell*, 242. *Thompson v. Button*, 14 *Johns. R.* 84. The rule that goods in execution are in the custody of the law, and therefore cannot be *replevied*, is applicable only when they were in the possession of the defendant in the execution. *Judd v. Fox*, 9 *Cowen*, 259. *Thompson v. Button*, *ubi sup.* Cattle belonging to a master taken by virtue of an execution against his servant from the possession of the latter, will be held to have been in the actual possession of the master, so he may maintain *replevin* for them. *Clark v. Skinner*, 20 *Johns. R.* 465. *Hall v. Atle*, 2 *Wendell*, 475. So any third person, having property in the goods, shall have *replevin* upon his constructive possession. *Dunham v. Wyckoff*, 3 *Wendell*, 280. But *replevin* will not lie where the original caption was lawful. *Gardiner v. Campbell*, 15 *Johns. R.* 401. *Marshall v. Davis*, 1 *Wendell*, 109. The validity and regularity of the judgment on which the execution issued, is open to inquiry in an action of *replevin*, to recover the goods levied under the execution. *Mills v. Martin*, 19 *Johns. R.* 32. *Vid. Morris v. De Witt*, 5 *Wendell*, 71. *Replevin* is, it seems, a local action. *Williams v. Welch*, 5 *Wendell*, 290. But see *Atkinson v. Holcomb*, 4 *Cowen*, 45.

Replevin lies for any tortious or unlawful taking of goods; and not in cases of distress only (a)

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Nov. 1810.
FARGURUM
v.
PATRIDGE.

The first section of the "act to prevent abuses, in delays in actions of replevin," (11 sess. c. 5.) [2 R. S. 522. sec. 1.] declares, "that if the beasts, goods or chattels of any person be taken and wrongfully detained, the sheriff, by a writ, &c., or upon complaint, without a writ, shall cause them to be replevied." The language of the act is general, and applies to every unlawful taking, whether by distress, or otherwise.

Gilbert (Gilb. on Dist. and Replevin, 3 ed. 87. Com. Dig. Replevin, A.) calls the writ of replevin, at common law, a judicial writ, intended as a speedy remedy; and he says, replevin lies for goods, in which the plaintiff has a qualified, as well as an absolute property; as if goods be in my hands, to be delivered to J. S., and J. N. takes them, I may have replevin to recover the possession, because I have a right of possession, against every body but J. S., and J. N. is, therefore, a trespasser. (*Gilb. 152. Com. Pl. 3 K.*) So replevin lies for goods, taken in execution, issued by an inferior jurisdiction. *Comyn* (6 Com. 224. *Replevin, A.*) says, if a man tortiously takes the person or goods and chattels of another, and detains them, a replevin lies. "Replevin lies of all goods and chattels unlawfully taken." In *Viner*, (18 Vin. Abr. 577. *Replevin, B. F. 2. F. 3.*) it is said, if a trespasser takes beasts, replevin lies of this taking, at election; and he cites the *Year Books*, 7 Hen. IV. 28 b. 6 Hen. VII. 9. 19 Hen. VI. 60. And *Bro. in replevin, pl. 37. 39.* cites 2 *Edw. IV. 16.*, for the owner may affirm property in himself, by bringing replevin. In all these authorities, we find the rule laid down generally, that replevin lies for a tortious or unlawful taking of goods, without reference or limitation to a distress.

In *Shannon v. Shannon*, (1 Schoales and Lefroy, 327.) Lord Redesdale says, that the writ of replevin is founded on any unlawful taking, and is calculated to supply the place of detinue and trover. He said, "he was sorry to hear Mr. Justice *Blackstone's Commentaries (Bl. Com. 146, 147.) cited, as an authority." "His definition of the action of replevin, is certainly too narrow; many old authorities will be found in the books, of replevin being brought, where there was no distress." Indeed, the law would, in many cases of a wrongful taking of chattels, be very deficient, if it did not afford this remedy by replevin; for the actions of detinue and trover would afford no compensation or redress to the party, to whom the possession of a thing may be of far greater value, than the thing itself.

Taylor, contra. This is the first time that I have heard that replevin would lie in any case except a distress. *Blackstone* (3 Bl. Com. 145. 147. Co. Litt. 145. b. 2 Crompt. Pr. 222. 2 Sell. Pr. 240.) expressly confines the remedy, by replevin, to the case of a distress. It is true, that there are dicta in the books, that replevin lies for an unlawful taking. But this must be such an unlawful taking, as is referred to by the

statute, which speaks only of a replevin in case of a *distress*. The position of *Gilbert*, that replevin lies for goods taken on execution issued by an inferior jurisdiction, is clearly erroneous. There are numerous authorities to the contrary; and it has been expressly decided, that a replevin will not lie for goods, taken by execution, in any case. (1 *Barnad. B. R.* 110. 2 *Stra.* 1184. *Wils. Rep.* 672. note 2. 6 *Term Rep.* 522. *Morgan's Vade Mecum*, 72, 73.)

Non cepit, and property, were the only pleas which the defendant could plead. He says, first, that he has not taken the goods in such a manner as will entitle the plaintiff to an action of replevin; and he also pleads, that they are his property, to entitle himself to a writ *de retorno habendo*. He could not *avow*; for it would be inconsistent with the other plea; and property cannot be given in evidence under the general issue, but must be pleaded in bar or abatement. (3 *Salk.* 307. 2 *Sell. Pr.* 254. 258.)

If replevin is allowed to lie in every case of an unlawful taking, it will produce great inconvenience, vexation and expense. It may be brought for the taking of *the most trifling article, and the proceedings may be removed into this court.

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VAN NESS, J., delivered the opinion of the court. The opinion I expressed, on the trial of this cause, that replevin lies only in the case of an unlawful distress, was a mistaken one. The passage to that effect, in *Blackstone's Commentaries*, is not warranted by the books. This action is usually brought to try the legality of a distress; but it will lie for any unlawful taking of a chattel. Possession by the plaintiff, and an actual wrongful taking by the defendant, are the only points requisite to support the action; and none of the cases, defining the nature of the action, confine it specially to the case of a chattel, taken under pretence of a *distress*. The old authorities are, that replevin lies for goods taken *tortiously*, or by a *trespasser*; and that the party injured may have replevin, or trespass, at his election. This is so laid down by *Gascoigne, J.*, in 7 *Hen. IV.* 28 b., and by *Danby, J.*, in 2 *Edw. IV.* 16., and by *Brian, J.*, in 6 *Hen. VII.* 9., and these *dicta* are cited as good law, in *Bro. tit. Replevin*, pl. 36. 39., and in *Roll. Abr. tit. Replevin*, B. The same rule was admitted, by the judges, in the case of *Mason v. Dixon*, (*Jones's Rep.* 173.) and in *Bishop v. Montague*, (*Cro. Eliz.* 824.) Similar language is held, in many of the modern authorities, cited by the plaintiff's counsel, upon the argument; and particularly by Baron *Gilbert*, Baron *Comyn*, and Lord *Redesdale*. The opinion of the latter is reported by *Schoales* and *Lefroy*, in which he lays down the law, with peculiar accuracy and precision. The provisions in our statute (11 sess. c. 5.) [2 *It. S.* 522, *et seq.*] apply chiefly to cases of illegal *distress*; but

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If this question be considered upon principle, it is proper this action should be maintainable, wherever *there is a *tortious* taking of a chattel out of the possession of another. A great variety of cases might be stated, in which no damages which a jury is legally competent to give, can compensate for the loss of a particular chattel.

The nonsuit must, therefore, be set aside, and a new trial granted, with costs to abide the event of the suit.

Rule granted.

PARSONS *against* BARNARD.

The courts of this state have no jurisdiction in actions brought for the infringement of patent rights, granted by the United States. The cognizance of such actions belongs to the circuit courts of the United States. (*Laws of the U. S. 6 Congress, 1 sess. c. 25. s. 3. 2 Cong. 2 sess. c. 11. s. 4.*) (a)

THIS was an action on the case. The declaration stated that the plaintiff, on the 23d June, 1808, obtained a patent from the *United States*, giving him and his assigns, &c., for 14 years, the exclusive right of making and vending a certain improvement for rectifying spirits, and that the defendant, well knowing, &c., did, on the 14th of August, 1808, without authority, use the said improvement, and rectify spirits, &c., to the damage of the plaintiff, &c.

The defendant pleaded, *in propria personâ*, after imparlance, stating, that the court ought not to take cognizance of the plea, because, by the constitution and laws of the *United States*, the Circuit Court of the *United States* has full cognizance of the plea, and this he is ready to verify, &c.

To this plea there was a general demurrer and joinder.

E. Williams, in support of the demurrer.

Woodward, contra.

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**Per Curiam*. The act of Congress, of the 17th of April, 1800, (vol. 5. p. 88.) declares, that whenever any patent right shall be infringed, the party offending shall forfeit a sum equal to three times the actual damage sustained, "which sum shall be recovered by action on the case, founded on the act, &c., in the Circuit Court of the *United States*, having jurisdiction thereof." The act of Congress of 21st February, 1793, (vol. 2. p. 203.) also declares, that, in certain cases, when judgment shall be rendered for the defendant, the patent shall be de-

(a) The clause in the patent law authorizing suits in the Circuit Court, stands on the principle that they are cases arising under a law of the *United States*. *Osborn v. Banc United States*, 9 Wheat. 733.

clared void. As the judicial power of the *United States* extends to all cases in law and equity, arising under the laws of the *United States*, and as the act of Congress, on the subject of patent rights, has declared that the suit for the infringement of them shall be brought in the Circuit Court of the *United States*, and gives the court power, in such cases, to declare the patent void, the state courts have, of course, no jurisdiction in the case; and judgment must be rendered for the defendant.

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SPENCER, J., not having heard the argument in the cause, gave no opinion.

Judgment for the defendant. (a)

(a) In the case of *Parsons v. Wigton*, on a demurrer to the like plea, there was also a judgment for the defendant.

NICOLLS against INGERSOLL.

THIS was an action of trespass, assault and battery, and for false imprisonment. The defendant pleaded the *general issue, with liberty to give in evidence any matter of justification.

At the trial, at the last *Green* circuit, the following facts appeared in evidence.

At a county court, held at *New-Haven*, in the state of *Connecticut*, the third *Tuesday* of *March*, 1803, *P. Edwards* became special bail for *Nicolls*, (the present plaintiff,) in a suit brought against him in that court, by *M. Hotchkiss*. The recognizance of bail was as follows: "At a county court, held, &c. Be it remembered, that in the above action, the parties appeared in court, and before plea pleaded, the defendant and *Pierpoint Edwards* acknowledged themselves bound to the plaintiff, in a recognizance of 500 dollars, as special bail for the defendant, conditioned that the said defendant should abide the final judgment that should be given in the said cause." A copy of the recognizance or bail-piece was certified by the clerk of the court, on the 1st of *October*, 1808, to which the seal of the court was also affixed; and a certificate of one of the judges of the court was endorsed, certifying that the clerk, who signed the certified copy of the recognizance, "was a clerk of the court, and keeper of the records, and that full faith and credit ought to be given to such certificate, which was in due form." Upon the same paper was

Bail may de-
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pute another to
take and sur-
render their
principal; and
the bail, or the
person deputed
by him for that
purpose, may
take the principal
in another
state, or at any
time and in any
place. (a)
Bail may
break open the
outer door of
the house, in
order to take
the principal.

(a) These principles were recognized in an adjoining state, in *Respublica v. The Gaoler of Philadelphia*, 2 *Yeates*, 263, and *Broome v. Hurst*, 4 *Yeates*, 123. In the former of these cases, the seizure was effected by deputy, but that fact is not adverted to either in the argument or opinion as a ground for impeaching its validity.

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written a power from *P. Edwards*, dated the 5th of *October*, 1808, under his hand and seal, as follows: "Know all men, &c., that I, *P. Edwards*, of, &c., being the same *Pierpoint Edwards* in the annexed copy of a bail-piece named and mentioned, have deputed, authorized and empowered, in my place and stead, and in my behalf, *Joseph Wilcox*, of *K.*, &c., marshal of the district of *Connecticut*, to take, arrest, seize and surrender to the sheriff of the county of *New-Haven*, in said state, *John Nicolls*, in said copy of a bail-piece hereunto annexed named, in exoneration and discharge of my recognizance aforesaid, as special bail for *the said *Nicolls*, in said cause; and to employ such persons and assistants as may be necessary to effect such purpose. In witness," &c.

On this power there was an endorsement, as follows: "I, the within named *Pierpoint Edwards*, do depute, authorize and empower *Asa Morgan*, of *New-Haven*, &c., to do and perform all those things, which, by the within power, I had authorized, deputed and empowered the within named *Joseph Wilcox* to do and perform, and I do hereby confer on him, the said *Asa Morgan*, all the power and authority, which, by the within instrument, I have conferred on the said *Joseph Wilcox*. Witness my hand and seal, the 11th of *October*, 1808."

The plaintiff proved, that on the 18th of *October*, 1808, *Morgan* and the defendant went to the house of the plaintiff, in , in the county of *Green*, about 12 o'clock at night, while the plaintiff and his family were in bed, and demanded the house to be opened, or that they would break it open, and soon after broke open the outer door, and entered, and found the plaintiff rising, and commanded him to dress. They, immediately, hurried him along with them to the river, and pushed him into a boat, without his hat or great coat, which were afterwards brought to him. On being asked why they treated the plaintiff in that manner, *Morgan* said he had a bail-piece and authority to carry the plaintiff to *Connecticut*. The witness understood that *Pierpoint Edwards* was the bail, and had deputed *Morgan* to take the plaintiff, who had promised, the day before, to go along with him, having been called on by *Morgan*, with the bail-piece; for that purpose.

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The defendant gave, in evidence, the certified copy of the bail-piece, and the power above stated, which *Morgan* had with him, at the time the plaintiff was taken; and it was proved that the defendant acted by the request of *Morgan*, as his assistant. When *Morgan* demanded entrance, or that he would break the door, a voice answered from an *upper room, and soon after the outer door was broken open. The plaintiff was unwilling to go, and was forced along, and pushed into the boat, in which they crossed the river to *Hudson*, where a wagon was ready to take the plaintiff away; but he was there discharged by a judge, having been taken by one *Parker*, on another bail-piece, which, the witness said, "grew out of a suit

brought by *Edwards*, against the plaintiff for this very demand." The defendant and *Morgan* treated the plaintiff with great roughness, and the witness expostulated with them for treating the plaintiff so harshly. The plaintiff admitted that *Morgan* had the bail-piece, but declined going, as he was on another bail-piece; and said he had made a settlement with *Morgan*, who had no right to take him. The reason assigned by *Morgan*, for going to the plaintiff's house in the night-time, and for hurrying him away, was the fear of a rescue, as *Parker* had taken the plaintiff on another bail piece.

The counsel for the plaintiff objected to the evidence, offered on the part of the defendants; but the objections were overruled by the judge.

It was proved by a witness, who was a counsellor of law of the state of *Connecticut*, that, by the practice of the courts of that state, special bail might take their principal when they pleased, and surrender him into the custody of the sheriff, without any copy of the bail-piece; that the paper offered in evidence, by the defendant, as a bail-piece, was in the form used in the courts of *Connecticut*.

The judge charged the jury, that the defendant was justified by the authority under which he acted, to take the plaintiff and carry him to *Connecticut*, to surrender him. That special bail had a right to enter, by force, into the house of the principal, after a reasonable demand of entrance and a refusal. That if the defendant had abused the authority under which he acted, he was liable for such abuse. That the questions of fact, whether the defendant had made a demand to be admitted before the door was broken, and whether undue and unnecessary force had been made use of in attempting to make the surrender, were submitted to the jury for their decision. If the jury were of opinion, in favor of the plaintiff, as to either of those facts, they ought to find a verdict for the plaintiff, otherwise, for the defendant; that, in his opinion, there was evidence to justify a belief that *Edwards* had paid the money in the suit, in which he was bail for the plaintiff, in *Connecticut*, or had become liable for the same; for had he not paid the money, or become answerable for the plaintiff, he would not have brought an action on the judgment against the plaintiff in this state; and that, though *Edwards* had sued the plaintiff for the same cause, and held him to bail, in this state, he was authorized to take the plaintiff on the bail-piece, and carry him to *Connecticut*, and surrender him there.

The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial, on the following grounds:—

1. That special bail cannot delegate their power to take and surrender the principal, unless in case of necessity, and such necessity must be clearly shown to exist.

2. That if the power could be delegated, yet, neither the

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bail nor his deputy can take the principal in a place out of the jurisdiction of the state, in the court of which the recognizance has been taken.

3. That the bail in this case having paid, and so discharged the judgment in the state of *Connecticut*, and having elected to proceed against the bail in this state, for the same cause of action and hold him to bail here, could not, afterwards, surrender him in the original action.

4. That special bail cannot break open the outer door of the house, to take the principal.

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**Van Buren and Woodward*, for the plaintiff. 1. There are no authorities in point, to show that the bail may delegate their power. The power of the bail cannot, as is pretended by the defendant, be unlimited, so that they may take the principal at all times, in all places, and under all circumstances. It is evident, from the expression used by the court in *Boardman and Hunt v. Fowler*, (1 *Johns. Cas.* 314.) that the power of the bail to depute, is confined to a *case of necessity*. This seems to be the reasonable rule. The confidence of the principal in his bail is *personal*; and the power ought not, except *ex necessitate*, to be transferred to a stranger.

2. The law supposes the principal to be always in the custody of his bail; but the power of the bail over the principal is not derived from any agreement between them, but from the court: and the court cannot authorize the bail to take the principal, in a place where the court could not authorize an arrest. In an *anonymous* case, in *Shower*, (2 *Show.* 202. 3 *Vin.* 498. *Bail*, A. a. 7.) it is said, if the principal abscond, and the bail cannot find him, they shall have a warrant, or tipstaff, to take him out of *White Friars*, or any other pretended place of privilege, because he is a prisoner to the court. No cases are to be met with, which are decisive on this point. The court must, therefore, decide on principle, and with a view to the consequences which may result from the doctrine contended for by the defendant.

3. The defendant had no right to break open the outer door of the plaintiff's house. A man's house is regarded, by law, as his *castle*, (5 *Co.* 91.) and is *privileged*, except for the purpose of serving criminal process.

4. The *bail*, in *Connecticut*, having brought an action against the principal, on which he has held him to bail in this state, has thereby waived his right to surrender him, in the original suit. The plaintiff must be considered in the custody of his bail here, and cannot be taken out of the state.

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**E. Williams*, contra. 1. This court have decided, that bail may depute, *ex necessitate*; and the court will now presume, that the necessity, in this case, was shown at the trial.

In *Fisher v. Fallows*, (5 *Esp. Cases*, N. P. 17.) Lord *Ellen*
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borough held, that the bail were entitled to recover, in an action of *assumpsit*, all the expenses he had been put to, in sending after the principal, for the purpose of surrendering him; he said, that if the principal absconds, so that he cannot be had, the bail may use every proper and necessary step to secure him. It is a necessary inference, from this decision, that the *English* courts consider the bail as having a right to depute another to take the principal. In the case of *Meddowcroft v. Sutton*, (*Bos. & Pull.* 61.) the executors of bail were allowed to surrender the principal. Not a doubt was suggested of their right to make the surrender. This is a deputation, by operation of law; and it shows that the right of making the surrender is not personal, or to be exercised only by the bail themselves.

2. Then, can this power be exercised out of the state, in which the recognizance was taken? If this power must emanate from the court, in which the party was held to bail, then it could not be exercised out of the jurisdiction of such court; and in the case of a recognizance of bail, in a court of *common pleas*, the bail could not take their principal, in another county; but a doubt has never been entertained, that, on a bail-piece from any court of common pleas, the principal may be taken in any county in the state. But this power of bail does not depend upon any authority, or process of the court. It results from an implied contract between the principal and bail, arising out of the relation between them; the principal having been, at his own request, taken from the custody of the sheriff, and delivered into the custody of his bail, where he is bound to remain, and, in contemplation of law, always does remain. This engagement follows the principal wherever he goes, and *wherever the bail can find him. Thus, it has been well said, (*Anonymous*, 6 *Mod.* 231.) "The bail have their principal on a string, and may pull the string whenever they please, and render him in their own discharge; they may take him even upon a *Sunday*, and confine him until the next day, and then surrender him; the doing it on *Sunday* is no service of *process*." In *French's* case, (6 *Mod.* 247.) the bail took their principal in the *city of London*, and committed him to the *Compter* there, in order to remove him by *habeas corpus*, and surrender him, in their discharge, in the Court of *King's Bench*, in which the original suit was brought; and before the surrender could be made, he was charged with a debt, at the suit of the *crown*; but the court held, notwithstanding, the bail might take the prisoner, and surrender him in the *King's Bench*.

The doctrine is this: the bail may take the principal, *when* and *where* he pleases: no time is so holy, on which it may not be done; no place is so sacred, into which he may not enter, for that purpose. He has the principal always on a string, and though extended to the remotest corner of the earth, he may pull it when he pleases. In *Wood v. Mitchell*, (6 *Term*

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Rep. 247.) in the *K. B.*, where the defendant had been convicted of felony, and sentenced to transportation, the court ordered an *exoneretur* to be entered on the bail-piece.

3. In *Sheers v. Brooks*, (2 *Hen. Black.* 120.) Lord *Loughborough* said, "When a party is bailed, the bail have a right to go into the house of the principal, as much as himself; they have a right to be continually with him, and to enter, when they please, to take him." The bail had a right, then, to break the door. The judge, at the time, seemed to think, that there should be a reasonable demand of entrance, and a refusal, before breaking the door. This fact, if necessary to be shown, must have been found by the jury. The court will now intend, that it was proved.

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4. It does not satisfactorily appear, for what the suit was brought against the plaintiff, by his bail, in this state. It may have been for the charges and expenses, the bail *has been put to, in attempting to make a surrender. If it was for the amount of the original judgment, that fact ought to have been clearly and fully proved. There was no evidence, whatever, that the judgment had been satisfied or discharged. I shall not, therefore, argue this point.

As to the abuse of the power, by the defendant, or the actual violence used against the plaintiff, the jury have decided on the fact; and there is no ground for granting a new trial, where the plaintiff could recover, at most, but *nominal* damages. (3 *Johns. Rep.* 239. 528.)

THOMPSON, J., delivered the opinion of the court. Several questions were made on the argument of this case. The first in order was, whether bail could depute or authorize another person in his stead, to take and surrender his principal. In *Boardman v. Fowler*, (1 *Johns. Cas.* 314.) decided in this court, the surrender was made by an agent of the bail, and one of the objections taken to it was, that bail could not depute for this purpose. By the form of the certificate, however, the principal appeared to have surrendered himself, and the court said they would presume it was done voluntarily. But if it had been necessary to decide the question, they were inclined to the opinion that special bail may depute, *ex necessitate*. The case of *Meddowcroft v. Sutton*, (1 *Bos. & Pull.* 62.) shows, that the executor of bail may surrender the principal. This may fall within the rule suggested in the last case; but they both go to establish the general principle, that the right to surrender results from the relation between the bail and principal; that it is to be effected as circumstances shall require, and is not a personal power or authority, to be executed by the bail only. Lord *Ellenborough*, in *Fisher v. Fellows*, (5 *Esp. Cas.* 171.) allowed bail to recover against his principal the expenses of sending after him to take him, for the purpose of making a surrender. *The bail, says he, has a

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right to surrender the principal in his own discharge, and for his own security; and if the principal absconds, so that he cannot be had, the bail may take every proper and necessary step to secure him. It is not expressly stated, that the person sent after the principal was deputed to take him; but it is fairly to be presumed, that such was the fact. I see nothing, on general principles, against allowing this power to be exercised by an agent or deputy; and no case is to be found where the right has been denied. It is a general rule of law, even with respect to public officers, that their ministerial acts may be performed by deputy; and with respect to private individuals, the law recognizes the act of an authorized agent as equal to that of the principal; and there is no principle of policy which renders it necessary to make this case an exception.

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The next inquiry is, as to the right of bail to take the principal out of the state in which the recognizance was entered into. I do not perceive how any question of jurisdiction can arise here. The power of taking and surrendering is not exercised under any judicial process, but results from the nature of the undertaking by the bail. The bail-piece is not process, nor any thing in the nature of it; but is merely a record or memorial of the delivery of the principal to his bail, on security given. It cannot be questioned, but that bail in the common pleas would have a right to go into any other county in the state to take his principal; this shows that the jurisdiction of the court in no way controls the authority of the bail; and as little can the jurisdiction of the state affect this right, as between the bail and his principal. How far the government would have a right to consider its peace disturbed, or its jurisdiction violated, or whether relief would not be granted on *habeas corpus*, where a citizen of this state was about to be carried to a foreign country, are questions not now before the court.

A recurrence to a few cases in the books, showing *the relation in which the law considers the bail as standing towards his principal, will render it obvious, that the power with which he is clothed is not one restricted in its exercise to any particular place. Sir *William Blackstone* (3 *Com.* 290.) says, the security given for the appearance of a party arrested, is called *bail*, because the defendant is delivered to the surety, and is supposed to continue in his friendly custody, instead of going to gaol.

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Bail, in the language of the books, are said (6 *Mod.* 231.) to have their principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge. They may take him up, even upon a *Sunday*, and confine him until the next day, and then surrender him. The doing so on *Sunday* is no service of process, but rather like the case where the sheriff arrests a party who escapes, for that is only a continuance of the former imprisonment. Lord

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Hardwicke says, (1 *Atk.* 237. *Ex parte Gibbons*.) it is the constant language of courts, that bail are their principals' *gaolers*, and that it is upon this *notion* that they have an authority to take them; and that, as the principal is at liberty only by the permission and indulgence of the bail, they may take him up at any time. The same principle is recognized in *Shower*, (*Anonymous case*, 214.) where it is said by the court, that bail are but *gaolers*, *pro tempore*; and in case a man absconds, and his bail cannot find him, they shall have a warrant to take him out of any pretended place of privilege, in order to surrender him, because he is a prisoner to the court, and they may call him at pleasure. If the principal is to be considered as standing in the situation of a prisoner who has escaped from the arrest of the sheriff, according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner, in a neighboring state; and, by parity of reasoning, bail must have the like authority. The cases I have referred to are sufficient to show that the law considers the principal as a prisoner, whose *gaol* *liberties are enlarged or circumscribed, at the will of his bail; and, according to this view of the subject, it would seem necessarily to follow, that, as between the bail and his principal, the controlling power of the former over the latter may be exercised at all times and in all places; and this appears to me indispensable for the safety and security of bail.

Another question presented was, whether the bail had a right to break open the outer door of the plaintiff's house to make the arrest. The verdict authorizes us to presume, that a demand was made before entry; for this fact was submitted to the jury as being necessary to be shown by the defendant, to render the entry lawful. That the bail may break open the outer door of the principal, if necessary, in order to arrest him, follows, as a necessary consequence, from the doctrine, that he has the custody of the principal; his power is analogous to that of the sheriff, who may break open an outer door to take a prisoner, who has escaped from arrest. But the case of *Shears v. Brooks*, (2 *H. Black.* 120.) goes the whole length of this doctrine. Lord *Loughborough* there says, when a party is bailed, the bail have a right to go into the house of the principal, as much as he has himself. They have a right to be constantly with him, and to enter when they please, and take him. The right to break open the plaintiff's house, in the case before us, is fortified by the circumstance of his having been taken a few days before, on the bail-piece. His situation, in point of fact, as well as in judgment of law, was somewhat analogous to that of a party escaping from arrest.

One of the judges made an observation, in the case last referred to, which is very important, and shows that, on all these points, the rights of the bail should be liberally consid
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ered. He said, that a determination, in that case, against the right of the bail to enter the house, would affect the liberty of the subject, as it would make it extremely difficult to procure bail.

* The objection, that the bail had discharged the judgment, and for his indemnity had arrested the plaintiff here, and held him to bail, is not supported by the requisite evidence to establish the fact. The loose declarations relative to a bail-piece against the plaintiff, in a cause for the same demand, was not such evidence as the case required, and was in the power of the party. There is nothing in the case to warrant us in saying that the time to surrender had elapsed. If that was the fact, it was susceptible of clear and positive proof; and if the plaintiff intended to rely upon that allegation, he was bound to support it by satisfactory evidence.

Whether the authority to arrest was not abused by the exertion of undue force, or unnecessary severity, has been decided by the jury in favor of the defendant. This was matter of fact, proper for their determination, and was very fairly submitted to them. The verdict, therefore, on this point, ought not to be disturbed.

The motion for a new trial must be denied.

SPENCER, J., not having heard the argument in the cause, gave no opinion.

Rule refused.

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v.
DE WALT.
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JACKSON, *ex dem.* DAVY, *against* DE WALT.

THIS was an action of ejectment, for land in the *Springfield* patent. The cause was tried at the *Otsego* circuit, in June last, before Mr. Justice *Spencer*.

At the trial, the plaintiff proved that *Thomas Davy* purchased the lot in question, in 1771, and possessed it *until 1777, when he died. The lessor of the plaintiff was his only son and heir at law. His widow, and son, and a daughter, (who

A. died *seize* 1 of land, in 1771, leaving a widow, an only son, his heir at law, and a daughter. The widow entered into possession of the land; and the daughter

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having married B., the widow gave permission to B. and his wife, to take possession and occupy a part of the land; and B. continued in possession, claiming to hold in right of his wife. In an action of ejectment, brought by the heir at law, against B., it was held, that the legal intendment was, that the widow entered as guardian, in *socage*, to her infant son; and that the defendant, having entered by permission of the guardian and under the title of the heir at law, could not set up a title in a third person, in contradiction to the title under which he so entered. (a)

(a) Vid. *Jackson v. Stewart*, 6 Johns. R. 34. *Jackson v. Fouburgh*, inf. 186. *Brant v. Livermore*, 10 Johns. R. 350. *Jackson v. Bush*, Id. 223. *Jackson v. Hinman*, Id. 292. *Schauber v. Jackson*, 3 Wendell, 62. *Jackson v. Mancius*, Id. 357. *Jackson v. Harper*, 5 Wendell, 246. *Jackson v. Rowland*, 6 Wendell, 666. These cases recognize three instances in which the defendant cannot set up an outstanding title. The first is the case in the text; the second, when the tenant is a mere intruder, and the third, where the plaintiff claims under a judgment and execution against the defendant. The rule has been laid down more broadly still in the Supreme Court of the United States. Vid. *Love v. Simm's Lessee*, 9 Wheat. 515.

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was the wife of the defendant,) abandoned the place during the war; and, afterwards, the widow and family returned and took possession, the lessor of the plaintiff being still a minor. The widow, about 19 years ago, gave her daughter and the defendant permission to occupy part of this lot. They have taken possession of 50 acres, claiming to hold it under *Thomas Davy*, in right of the wife of the defendant, as heir.

The defendant offered to prove a sale of the lot, for quit-rent, in 1772, and a lease to the defendant, in 1809, from *Joseph Winter*, who claimed title under that sale. This evidence was rejected. The defendant disclaimed to hold under the lessor. The judge charged the jury, that as the defendant came into possession, under the title of *Thomas Davy*, and by permission of the widow, he could not set up a title, under the sale for quit-rent; and the jury, thereupon, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

Van Vechten, for the defendant.

Gold, for the plaintiff.

Per Curiam. The widow must be considered as entering as guardian, in socage, to her infant son, the lessor of the plaintiff. This is the legal intendment, especially as there was no act or declaration of the wife, inconsistent with that character. (a) (1 *Johns. Rep.* 163.) The plaintiff showed title, and the defendant, having entered under that title, and with permission of the guardian of the plaintiff, cannot be permitted to set up a title in a third person, in contradiction to the title under which he entered. (4 *Johns. Rep.* 210.) The motion to set aside the verdict must be denied.

Motion denied.

(a) Vide *Byrne v. Van Hoesen*, 5 *Johns. Rep.* 66

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Nov. 1810.

LOVE

v.

PALMER and
others.LOVE *against* PALMER and others.

THIS was an action of debt. The plaintiff declared on a bond dated the 7th of *August*, 1809, in the penalty of 200 dollars, *conditioned* to indemnify the plaintiff against all costs and damages, that shall or may arise against him, on account of his not taking *N. Palmer* to prison on account and by virtue of a *ca. sa.* which the plaintiff had in his hands, issued out of the Supreme Court, in favor of *Reuben Leonard* and *Rufus Leonard*; and the defendants bound themselves to pay the debt and costs, for which the *ca. sa.* was issued, viz. 94 dollars and 43 cents, to *R. & R. Leonard*, and to indemnify the plaintiff against all costs and damages which may or shall arise from the premises. The plaintiff assigned for breach, that the defendants had not indemnified him against the costs and damages that had accrued in consequence of his not committing the said *N. P.* to prison, upon the *ca. sa.* aforesaid, nor had paid the said debt and costs to the said *R. & R. Leonard*, besides the fees and poundage, for serving the *ca. sa.*, amounting to 10 dollars, nor brought to the plaintiff a discharge from the said *R. & R. Leonard*. The plaintiff then averred, that the *ca. sa.* was issued out of the Supreme Court, in *August* term, in 1809, returnable in *November* term following, for the sum aforesaid, in favor of the said *R. & R. Leonard*, and that the same was in the hands of the plaintiff, as *under-sheriff* to the sheriff of *Madison* county; and that, by means of his not taking the said *N. Palmer* *to prison, whom he had arrested by the *ca. sa.*, and in consequence of permitting him to escape, the sheriff had been sued for the *escape*, before this suit was brought, whereby the plaintiff has been damnified, and been obliged to expend 50 dollars, in defence of the said suit, and became liable to pay the said sum to the sheriff, &c.

There was a general demurrer to this declaration and joinder, which was submitted to the court without argument.

Per Curiam. It is apparent that the bond, in this case, was

(a) Every deviation by a sheriff from the prescribed course of his regular official duties will be narrowly watched by the courts. Thus they will set aside a judgment entered upon a warrant of attorney accompanying a bond given by a defendant to the sheriff or gaoler, in the discharge of the defendant from execution in the original suit. *Richmond v. Roberts, infra*, 319. Nor will they permit the sheriff to retain and use the execution to enforce payment of advances made by him to relieve the defendant from imprisonment under it. *Reed v. Pruyn, infra*, 426. *Sherman v. Boyce*, 15 *Johns. R.* 443. A promissory note taken in satisfaction of a *ca. sa.* without the assent of the plaintiff, is void as between the sheriff and the maker, and the officer is liable for an escape. *Armstrong v. Garrow*, 6 *Cowen*, 465. So a promissory note, taken by a sheriff on an arrest in lieu of a bail-bond, though drawn by a third person, and endorsed by defendant, is illegal and void. *Strong v. Tompkins*, 8 *Johns. R.* 98. And the introduction of a substantial variance from the statutory form, in a bond for the limits, will vitiate the security and bar the sheriff's recovery for an escape. *Sullivan v. Alexander*, 19 *Johns. R.* 233.

Where an under-sheriff took a bond to indemnify him for all costs and damages, &c. for not taking *N. P.*, against whom the said sheriff held a *ca. sa.* at the suit of *L.* to prison, as security for the debt; the bond was held to be void, as taken by the sheriff, for ease and favor, or by color of his office, and in other form than that prescribed by statute. (a)

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taken as an indemnity for an escape, *then in contemplation*, and not for an escape which had previously happened. The plaintiff had the prisoner and the *ca. sa.* in his possession when he took the bond, and it was given for the deliverance of the prisoner from custody. It was accordingly void in law, for the party was not bailable. The case of *Dive v. Manningham* (*Plowden*, 60.) is an early and solemn determination upon the point. That was an action of debt, upon a bond of indemnity, given to the plaintiff, as sheriff, for the delivery out of prison of a prisoner, whom the sheriff had taken in execution for a debt; and on demurrer, the bond was held to be void, both by the common law, and under the statute of 23 *Hen. VI. c. 9.* which we have adopted, (sess. 24. c. 28. s. 13.) [2 *R. S.* 286. sec. 59.] as being taken for *ease and favor*, or by *color of his office*, in *other form* than that prescribed by the statute. The same doctrine is recognized in numerous subsequent cases, and is not now to be questioned. (10 *Co.* 99. *Cro. Eliz.* 66. 199. *Yeln.* 197. 2 *Bulst.* 213. 2 *Johns. Cas.* 245.) Judgment must, therefore, be given for the defendants.

Judgment for the defendants.

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*OSBORNE *against* MOSS.

Where a person makes a fraudulent conveyance of his goods to another, for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate, and an action may be maintained against the administrator for the goods. (a)

THIS was an action of trespass *quare clausum fregit*, &c. The declaration stated, 1. That on the 10th of *September*, 1809, the defendant, at *Moreau*, in *Saratoga* county, broke and entered the close of the plaintiff, and took and carried away one pair of oxen, of the value of 200 dollars, and two cows, of the value of 100 dollars. 2. For taking and carrying away the same chattels. The defendant pleaded as to the force, &c., not guilty; and as to the residue, that before, &c., to wit, on the 11th *September*, 1809, the defendant was legally appointed administrator of *Samuel Hodges*, deceased; that the intestate was possessed, as of his own proper goods, of the said chattels, and that the defendant,

(a) Confessed a judgment to *B.* fraudulently, for the purpose of defeating his creditors, on which execution issued, and the goods of *A.* were seized, when *A.* died intestate, and the goods were purchased by *B.* at the sheriff's sale by the highest bidder, but for the same fraudulent purpose; and *C.*, being a creditor of *A.*, took out letters of administration on his estate, and seized and took the goods out of the possession of *B.* as the property of *A.* In an action of trespass brought by *B.* against *C.*, it was held that *C.*, in his character of administrator, could not impeach the judgment on the ground of fraud; and that he had no right to take the goods, as a creditor, without suit, but was a trespasser. But though he was administrator of *A.*, he might, as creditor, have sued *B.* as executor *de son tort*. (b)

(a) *Vid. Jackson v. Garnsey*, 16 *Johns. R.* 189. *Jackson v. Cadwell*, 1 *Coven*, 622. *Mackie v. Cairns*, 5 *Coven*, 547.

(b) *Vid. Campbell v. Tousey*, 7 *Coven*, 64.

as administrator, entered and took the chattels, and this he is ready to verify, &c.

The plaintiff replied, that before, &c., to wit, on the 7th of *August*, 1809, in the life of the intestate, at a justice's court, held, &c., he, the plaintiff, by the judgment of the court, recovered against the intestate 20 dollars and 3 cents, and that on the 8th of *August*, in the life of the intestate, he obtained execution upon the said judgment, and delivered it to a constable, who levied on the said chattels, in the life-time of the intestate, and gave notice of the sale for a day certain; and that the intestate died before that day, viz. on the 19th of *August*, 1809; that the sale of the chattels took place at the day appointed; and the plaintiff purchased them as the highest bidder, and they were delivered to him by the constable; and this he is ready to verify, &c.

The defendant rejoined, that before the said judgment, *and before the debt arose for which the said judgment was rendered, the intestate was indebted to the defendant in 200 dollars, which the plaintiff knew when the judgment was rendered, and when the debt arose; that the said chattels were all the goods of the intestate; that the debt or demand of the plaintiff was fraudulent or covinous, and made by the plaintiff and intestate to cheat the defendant and the other creditors of the intestate; and that the judgment was procured by the plaintiff and intestate, to defeat the defendant and the other creditors; that the execution and sale were contrived and intended for the same purpose, and with a fraudulent intent on the part of the plaintiff and the intestate; and this he is ready to verify, &c.

There was a general demurrer to the rejoinder, and a joinder in demurrer.

H. Bleeker, in support of the demurrer. A fraudulent donor cannot avail himself of the fraudulent conveyance; and the administrator stands in the place of the intestate, and has no greater or other rights than the person he represents. In *Packman's* case, (6 *Co. Rep.* 18.) it was held, that a gift made by *covin*, though void under the statute of 13 *Eliz.* c. 5. as against a creditor, remained good against the donor, or his administrator. The same point was decided in *Hawes v. Leader*, (Cro. Jac. 270.) which is a case precisely analogous. But a creditor has no right to take the property, without any suit; and the defendant being a creditor as well as administrator, can make no difference. The chattels were not *assets* in the hands of the administrator, for the property was not sold before the administration was granted. They could be *assets* only in the hands of the plaintiff, as *executor de son tort*. The proper remedy for the defendant as creditor, or administrator, is by an action against the plaintiff as an *executor de son tort*. (*Com. Dig. Adm. C. 3. Styles*, 384. *Rob. on Fraud. Conv.* 593, 594. 2 *Term Rep.* 587. *Yelv.* 197. 2 *Leo.* 227. 3 *Leo.* 57. *Cro. Jac.* 271.)

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**Skinner*, contra. The judgment being void as fraudulent, the property became *assets* in the hands of the administrator. In *Belthel v. Stanhope*, (*Cro. Eliz.* 81. 2 *Term Rep.* 97.) it was decided, that where a person makes a fraudulent gift of goods, and dies indebted, the gift is utterly void against creditors, and the goods are *assets* in the hands of the administrator. The case of *Waring v. Dewberry* (1 *Str.* 97.) shows that the rights of the administrator relate back to the death of the intestate. It can make no difference, therefore, that the property was sold after the death of the intestate, but before any administration was granted. The material inquiry is, In whom was the property when the intestate died? If, as I contend, it was in the intestate, it belonged to the administrator, who might bring *trespass* or *trover* for it. If the creditors have a right to this property, why may not the administrator recover it for them? A creditor might inform him of the fact of its having been fraudulently conveyed, and request him to insert it in the inventory. In *Cadogan v. Kennett*, (*Cowper*, 432.) Lord *Mansfield* said that the statutes of the 13 and 27 *Eliz.* could not receive too liberal a construction, or be too much extended in suppression of fraud. The first statute was made for the protection of creditors; and any transaction, if done for the purpose of defeating creditors, though there may be a fair and full price paid, is fraudulent and void.

Per Curiam. The defendant justifies, as administrator of *Hodges*, the taking of the goods in question from the possession of the plaintiff; and he denies the right of the plaintiff to hold them under the judgment and execution which he had against the intestate, because the judgment, execution and sale were all procured by covin and fraud between the plaintiff and intestate, to cheat the creditors of the intestate; and this fact is admitted by the demurrer. But the case of *Hawes v. Leader* * (*Cro. Jac.* 270. *Yelv.* 196.) is an answer to this defence, and completely destroys it. In that case, the intestate made a grant of his goods to *B.* by fraud between him and *B.* to cheat the creditors, and he kept possession of the goods, and died. *B.* then sued the administrator for the goods, and he pleaded this covin and fraud and the statute of 13 *Eliz.* which declares all such gifts and grants void as against creditors; but, on demurrer, the plea was held bad, and judgment was rendered for the plaintiff, on the ground, among others, that the deed was void only as against creditors, but that it remained good as against the party himself, and his executors and administrators. This ground of the decision is mentioned by *Yelverton*, in his report of the case, with *quod nota*; and he was counsel for defendant, and his reports are among the best of the old authorities.

The defendant further sets up in his defence, that he was a creditor, as well as administrator of the intestate. This was

not stated in his *plea*, but in his *rejoinder*; and it is stated rather as inducement than as matter of justification. It does not, however, alter the case. As creditor, he had no right to take the goods without suit. He was still a *trespasser*; and, in his character of administrator, he could not attack the judgment on the ground of fraud. His remedy, as creditor, would have been to have sued the plaintiff for his debt, and charged him as executor *de son tort*. This he could have done, notwithstanding he was administrator; and the case of *Ashby v. Child* (*Styles*, 384.) is expressly to this point. The plaintiff is, therefore, entitled to judgment.

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STEWART
V.
KIP.

Judgment for the plaintiff.

*J. STEWARD, jun. against KIP, Sheriff, &c.

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THIS was an action of *debt*, brought against the defendant, as sheriff of *Oneida* county, for the escape of *Abel Brigham*, charged in execution at the suit of the plaintiff.

The declaration stated the judgment, and a *ca. sa.* issued thereon for 1,007 dollars and 86 cents debt, and 14 dollars and 44 cents, cost. The escape was alleged to have been on the 16th *February*, 1807. The defendant pleaded *seven* pleas; which, with the rest of the pleadings and issues, were the same as in the case of *Bissel v. Kip*. (*5 Johns. Rep.* 89.)

The cause was tried at the *Oneida* circuit, the 18th *June*, 1810, before Mr. Justice *Spencer*.

Most of the evidence was similar to that stated in the case of *Bissel v. Kip*. The plaintiff proved that *Brigham* was in the custody of the defendant on the execution, and that on the 8th *February*, the prisoner was walking along the side walk of the main street, in the village of *Whitestown*, within the liberties, when he left the side walk, and walked through the middle of the street, for the distance of about 20 rods.

The defendant then moved for a nonsuit, on the ground, that the plaintiff having, by his pleading, admitted that there were gaol-liberties regularly established, it was incumbent on him to prove that the place where the prisoner walked was without the liberties; but the judge overruled the motion, and decided that the defendant was bound to show that the place where the prisoner was seen walking was within the liberties.

The defendant produced the minutes of the Court of Common Pleas, of the 19th *May*, 1808, and a witness *testified, that though the survey was erroneous, yet the place where the pris-

In an action against a sheriff for an escape of a prisoner charged in execution, it is sufficient evidence, on the part of the plaintiff, *prima facie*, to entitle him to recover, that the prisoner was seen at large, walking in the street. See *Bissel v. Kip*, 5 *Johns. Rep.* 89

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oner walked was not within the *actual* or *reputed* liberties, and that the prisoner was before informed of that fact, and must have known it before he went there; that the place where the prisoner walked was two or three rods beyond the reputed limits, and the prisoner immediately returned within the liberties.

The plaintiff then proved that on the 16th *February*, 1809, the prisoner went into the office of *Reuben Leavenworth*, in *Whitestown*, and while he was there, the writ was issued in this cause, against the defendant, and delivered to the *coroner* to be executed. That the survey of the liberties, though inaccurate, and not marked by any visible monuments or boundaries, would not include the office of *Leavenworth*, and that the prisoner could not go in or out of the office, without passing beyond the liberties; but the office was generally reputed to be within the liberties.

The jury, by direction of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict and for a new trial, on the following grounds:—

1. That upon the fourth plea and the issue joined thereon, it was incumbent on the plaintiff to prove that *Brigham* was not only without the prison walls, but that he went beyond the *gaol*-liberties; and that the motion for a nonsuit was improperly overruled.

2. That no escape from the *gaol*-liberties was proved.

3. That if the prisoner did go beyond the liberties, it was unintentional; and as the limits were vague and uncertain, it was excusable, as an act of inadvertence.

4. That if the prisoner did intentionally go beyond the liberties, he returned before suit brought, and has since remained a faithful prisoner; and that the statute passed in *April*, 1810, [2 *R. S.* 437. sec. 64.] concerning escapes, protects the sheriff.

*The case was submitted to the court without argument.

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Per Curiam. The plaintiff, upon the trial, proved that the prisoner was returned by the defendant in custody, upon *ca. sa.*, and that he was afterwards seen at large in the village of *Whitestown*, at the tavern of *Amos Gay*, and on his return from thence, he walked through the middle of the street. This was, at least, *prima facie* evidence of an escape, and showing enough in the first instance. So it was laid down in the case of *Bissel v. Kip*. (5 *Johns. Rep.* 89.) But if any doubt existed, whether this was enough, under the issue joined upon the fourth plea, the defendant immediately supplied the deficiency, by producing a witness who testified, that the place where the prisoner was seen walking was neither within the actual nor reputed liberties, and that the prisoner had been previously so informed.

There is not, then, in this case, any color for our interference

with the verdict, and the motion on the part of the defendant is denied.

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Motion denied. (a)

KIP
v.
BRIGHAM.

(a) To support an action against the sheriff for an escape, the fact of the prisoner's being off the limits of the liberties of the gaol must be affirmatively and satisfactorily shown, by direct and positive proof. Nothing will be intended or inferred. *Visscher v. Gansevoort*, 18 Johns. R. 496.

The prisoner is bound at his peril to keep within the liberties, and if in any part they are vague and undefined, he should confine himself to places where they are definite. *Kip v. Brigham*, infra, 168.

It seems, that if the map and survey are uncertain, the reputed limits are the best evidence of the actual liberties of the gaol. *Ballou v. Kip*, infra, 177.

*KIP against BRIGHAM and others.

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THIS was an action of *debt*, brought by the plaintiff, as sheriff of the county of *Oneida*, against the defendants, on a bond given by them to the plaintiff, dated the 22d of *July*, 1808, as security for the *gaol-liberties*, granted by the plaintiff to *Abel Brigham*, one of the defendants, who was a prisoner in gaol, on a *ca. sa.*, at the suit of *John Steward*, jun., for 521 dollars. The defendants pleaded *non est factum*, with notice of special matter to be given in evidence at the trial.

The cause was tried at the *Oneida* circuit, the 18th *June*, 1810, before Mr. Justice *Spencer*.

At the trial, the plaintiff, after proving the execution of the bond, offered in evidence the *nisi prius* record and verdict, in the suit of *John Steward*, jun., against the plaintiff, for the escape of *Brigham*, and which was tried the same day. (See *ante*, p. 165.)

The defendants objected to the *nisi prius record and verdict*, as evidence; but they were admitted by the judge as conclusive against the defendants, unless he could show that the verdict had been obtained by fraud and collusion between *Kip* and *Steward*.

The plaintiff proved, that immediately after the suit was commenced against him by *Steward*, he gave notice thereof to the defendants, and that that suit was regularly defended by the plaintiff, aided by the active coöperation of the defendants.

bond,) to prove the recovery and actual damages, at least, if not the escape; and the sheriff is entitled to recover against the sureties, not only the amount of the debt and costs in the original suit, but also the costs of defending the suit against himself for the escape. (a)

A person who has given security for the liberties of the gaol, is bound, at his peril, and at the risk of his sureties, to keep within the liberties; and though the limits established by the Court of Common Pleas are in any part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined, and within the limits; for he is bound to know and observe the limits. It is not the duty of the sheriff to ascertain the bounds of the liberties; but he is required to let the prisoner on execution go at large within the liberties, when established by the Court of Common Pleas.

In an action brought by a sheriff on a bond taken for his security, on granting the liberties of the gaol to a prisoner on execution, against the sureties, the record of a judgment of recovery against the sheriff, for the escape of the prisoner, is conclusive evidence for the plaintiff. As where a verdict was recovered against the sheriff for the escape of a prisoner who had given security for the liberties of the gaol, it was held, that the *postea* was evidence, without the judgment, (in an action brought by the sheriff on the

(a) Vid. *Sprague v. Seymour*, 15 Johns. R. 471.

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*The plaintiff claimed the amount of the original judgment, interest, costs and poundage, in the case of *Steward against Brigham*, and also the costs of the suit of *Steward v. Kip*, and of *Kip* at the suit of *Steward*, amounting to 290 dollars and 5 cents, which were objected to by the defendants, but allowed by the judge.

The plaintiff then proved the escape of *Brigham*, in the manner stated in the suit of *Steward v. Kip*, and gave in evidence the minutes of the Court of Common Pleas, establishing the gaol-liberties. Two surveyors were also produced, who testified, that they attempted a survey of the liberties of the gaol, according to the courses and distances contained in the minutes of the Court of Common Pleas, but found them so inaccurate, that it was impossible to run the lines without passing over private enclosures, &c.

The jury, under the direction of the judge, found a verdict for the plaintiff for 914 dollars and 86 cents.

A motion was made to set aside the verdict and for a new trial; and the same was submitted to the court without argument, on a case containing the above facts.

KENT, Ch. J., delivered the opinion of the court. This case is submitted, without argument, upon a motion to set aside the verdict.

The counsel for the defendants have stated the following points:—

1. That the record of recovery against the plaintiff for the escape, even if judgment had been rendered and shown, was not evidence. (a)

2. That the verdict was not evidence until consummated by a judgment.

3. That the costs of the suit against the plaintiff ought not to have been allowed as part of the damages.

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4. That there were no gaol-liberties, and the plaintiff *voluntarily suffered the prisoner to go without the walls of the prison.

5. That the gaol-liberties (if any) were so vague as to excuse the prisoner.

The first objection was disposed of, in the opinion given at the last term, in the case between the same parties, (6 *Johns. Rep.* 168.) arising under *Bissel's* execution; but the 2d and 3d objections present new questions, which merit some attention.

Here was only a verdict shown, and it appears to have been given on the same day that it was offered in evidence. The suits of *Steward against the plaintiff*, and of the *plaintiff against the defendants*, were carried on concurrently in point of time, and brought to trial at the same circuit. It had been considered in the books as a rule, (though rather founded upon loose dicta, than solemn decisions,) that a verdict was not evidence

(a) Vid. *Barney v. Dewey*, 13 *Johns. R.* 226.

without showing a judgment upon it; because it could not appear but that the verdict had been set aside, or the judgment arrested. The case of *Fisher v. Kitchingman*, in the time of Lord Ch. J. *Willes*, (*Willes's Rep.* 367. 7 *Mod.* 451.) appears to be the first regular argument and decision upon the question, and several cases were then cited on both sides, to show that *postea* were and were not evidence. The court said, that there was no general rule that could be laid down, in relation to this point, but that the *postea* was or was not evidence, according to the nature of the thing which it was produced to prove. It was good to prove the fact of a trial and verdict in such a case, but not evidence of itself, without the judgment, when it became essential to the action or defence. In the late case of *Gurland v. Scoones*, (2 *Esp. Rep.* 648.) Lord *Kenyon* went further than the decision in this case would warrant, for he ruled that the mere production of the *postea* was sufficient to establish a demand by way of set-off, to the extent of the sum endorsed *as the verdict in the cause. In the present case, the verdict was not requisite to prove the fact of the escape, for that fact was proved sufficiently without it; and if there be legal and full testimony to a point, further and illegal evidence to the same point will not destroy the effect of the competent proof, nor render it necessary to interfere on that ground. But the verdict was good evidence for certain purposes. It was evidence to prove the fact of a suit and verdict against the plaintiff, for the escape in question, and it was so far proof of actual damage. The cause of action was made out by proving the bond and the escape, and the plaintiff was entitled to an assessment of damages to the amount of the debt. It is enough for a party, in order to maintain his action on a bond of indemnity, to show that he was liable and had paid the debt; (5 *Co.* 24.) or that he was sued; (1 *Sid.* 442. *King v. Atkins*;) or that he was even exposed to a suit, for so said *Brian, J.*, and *Littleton, J.*, in 18 *Edw.* IV. 27. and this was the decision in the case of *Cutler v. Southern*. (1 *Saund.* 116. 1 *Lev.* 194.) It is stated, that the defendants had due notice (a) of the suit against the plaintiff, and that they actively coöperated in defence of it. The verdict is, therefore, to be considered, in effect, as a verdict against *them*, and I see no reason why it may not be considered as evidence of the amount of the debt or demand against the plaintiff. For this purpose it was admissible, as much as it would have been to prove a set-off; and, with that view, a verdict has been deemed good evidence by the Court of K. B. in *Baskerville v. Brown*. (1 *Bl. Rep.* 293.) (b)

The costs of the suit against the plaintiff arose after the cause of action commenced, but they were only a charge accessory to the principal demand, and are analogous to the case of interest accruing after the suit brought. The defend-

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(a) Vid. *Bartlett v. Campbell*, 1 *Wendell*, 50.

(b) Acc. *Waldo v. Long*, *infra*, 173.

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ants were most justly chargeable with the costs of the suit against the plaintiff, for they, *in fact, defended the suit. The costs were part of the loss and damage which the plaintiff had sustained, by means of the default of the defendants, in not satisfying the creditor. There are many cases in which damages, accruing after the suit brought, and down to the trial, have been allowed to be included in the verdict; and this becomes indispensable, when no new suit will lie for these damages. (2 *Burr.* 1085, 1086, 1087. 2 *East.* 211. 10 *Co.* 117. a. 2 *Ld. Raym.* 802, 803.) In suits upon bonds for the performance of covenants, the courts of law are said to have the same equitable jurisdiction under the statute of 8 and 9 *Wm.* III. (which we have adopted,) as chancery had before; (*Cowp.* 358.) and in one case, in a suit upon such a bond, (*Waldo v. Fobes*, 1 *Mass. Rep.* 10.) it has been held to be proper to allow the damages accruing down to the trial, to be computed, without putting the party to the necessity of a *sci. fa.* (a)

The two last objections are certainly without foundation. The defendants, by their bond, and by every branch of the notice annexed to their plea, admit that there were liberties appointed to the gaol in question. They are estopped from denying that fact; and if they were not, it was shown upon the trial, and admitted on both sides, and the only question was, as to the precise lines or boundaries of the gaol-liberties. The prisoner was bound, *at his peril*, and at the risk of his bail, to keep within the liberties, and if the lines were in any part vague and indefinite, it was his duty to confine himself within places where they were not so. Liberties had been appointed by the Court of Common Pleas, and the plaintiff was bound to take the bond, and to leave his prisoner to go at large within the liberties, so far as they had been duly appointed. It was not his duty, but the duty of the prisoner, to ascertain the lines, and to observe them. The defendants, upon the trial, showed *by their own survey, that the prisoner went without the liberties, and the court knew, that upon the trial of the principal cause against the plaintiff, (for they have the case before them,) it was proved, that the prisoner went wilfully, and after due notice, beyond not only the actual, but the reputed liberties. (b)

On a motion for a new trial, a reasonable discretion must be exercised, and if a serious difficulty existed upon this case, as to the admission of the verdict, and as to the sufficiency of the proof of the escape, a new trial would be useless, for judgment is now rendered upon the verdict in the principal cause, and

(a) In an action of *debt* against a sheriff for the escape of a prisoner in execution, the plaintiff is not entitled to recover *interest* on the debt or damages for which the prisoner was committed. 1 *Wendell*, 401. *Littlefield v. Brown*. 14 *Johns. R.* 255. *Thomas v. Weed*.

(b) *Ballou v. Kip*, *infra*, 177.

that judgment would be plenary proof, and put an end to all controversy about the right of recovery.

Upon a full consideration of this case, the court are accordingly of opinion, that the motion on the part of the defendants, for a new trial, be denied.

Motion denied.

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WALDO
v.
LONG.

WALDO against LONG.

THIS was an action of *covenant*, brought on the covenant against encumbrances, and on the covenant of power to sell, contained in a deed from the defendant to the plaintiff. Plea, *non est factum*. The cause was tried at the *Washington* circuit, the 13th of *June*, 1810, before Mr. Justice *Van Ness*.

*The plaintiff produced a mortgage, executed prior to the deed from the defendant to him, from the defendant to *William Porter*, which covered the land conveyed by the deed. The plaintiff also offered, in evidence, the *postea* in the cause of *Jackson*, ex dem. *William Porter and others*, against him, brought on the said mortgage, and previously tried, on the same day, as evidence of a suit against him. He also offered, in evidence, the bills of costs which had accrued, and which the plaintiff in this cause was liable to pay in consequence of the recovery against him in the action of ejectment. The judge reserved the point, as to the admissibility of the *postea* in evidence, and the plaintiff took a verdict for the consideration-money mentioned in the deed, and the interest, subject to a case on the point reserved.

The case was submitted to the court without argument.

The only point was, whether the *postea* ought to have been received in evidence. It was agreed, that if the court should be of opinion it ought, then the bills of costs were to be added to the verdict; otherwise, the verdict to remain for the sum it was taken.

Per Curiam. The *postea* was competent evidence for certain purposes. This point has been just now decided, in the case of *Kip v. Brigham and others*, (*ante*, 168.) who were bail

In an action of *covenant* brought by the grantee against the grantor for a breach of the *covenant*

[* 174] against encumbrances in a deed; the *postea* in an action of ejectment brought against the grantee by a mortgagee on a prior mortgage of the same land by the grantor, is sufficient evidence to support the action; (a) and the plaintiff is entitled to recover, not only the consideration-money in his deed, and the interest, but also the costs of the ejectment suit against him. (b)

(a) Vid. *Kip v. Brigham*, *supra*, 168. *Barney v. Dewey*, 13 *Johns. R.* 224.

(b) *Bennet v. Jenkins*, 13 *Johns. R.* 50. *Kane v. Sanger*, 14 *Johns. R.* 89. *Caulkins v. Harris*, 9 *Johns. R.* 324. See also *Mumford v. Withey*, 1 *Wendell*, 279. *Morris v. Phelps*, 5 *Johns. R.* 49. In an action on a covenant against lawful disturbance or eviction, the value of the land at the time of sale, not of the eviction, is the measure of damages. *Pitcher v. Livingston*, 4 *Johns. R.* 1. And on a covenant against encumbrances, the plaintiff, if he has extinguished the encumbrance, shall recover the price he has paid for it. *Delavergne v. Norris*, 7 *Johns. R.* 358. *Stannard v. Eldridge*, 16 *Johns. R.* 254.

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on *Steward's* execution. In this case, it was evidence of the existence of the ejectment suit upon the mortgage, and of the fact of a verdict in such a cause. For that purpose it ought to have been received; and that fact being proved, the bills of costs were an item of damages proper for the consideration of the jury, for they were part of the damages produced by the encumbrance.

This opinion is an answer to the only question submitted. The plaintiff has taken a verdict for the consideration-money *and interest, and no objection is raised to it, and, of course, we have no concern with the amount of the recovery.

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Judgment for the plaintiff. (a)

(a) See *Prescott v. Trueman*, 4 *Tyng's Mass. Rep.* 637. *Pitcher v. Livingston*, 4 *Johns. Rep.* 1. 3 *Caines*, 112. 2 *Mass. Rep.* 433.

BALLOU against KIP, Sheriff, &c.

Where the bounds of the liberties of the gaol were marked by no visible monuments, and the survey of them, as appointed by the Court of Common Pleas, was, in some parts, vague and uncertain, and a prisoner who had given bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the reputed limits,

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but which proved not to be within the acknowledged actual liberties, and returned within the actual liberties before suit brought; it was held, that this being an inadvertent and involuntary escape, and a return before suit brought, the sheriff was not liable for an escape. (a)

THIS was an action of debt, brought against the defendant, as sheriff of *Oneida* county, for the escape of *Oliver Babcock*, a prisoner in his custody on an execution in favor of the plaintiff. The cause was tried at the *Oneida* circuit, the 11th *June*, 1810, before Mr. Justice *Spencer*.

At the trial, the plaintiff proved a judgment against *Babcock* for 3,000 dollars of debt, and 72 dollars and 56 cents damages and costs; and that a *ca. sa.* was issued thereon, and a return of *Babcock* in custody. This action was commenced in *May*, 1809. *Babcock*, after being in custody, was seen out of gaol, in the office of *Reuben Leavenworth*, and in the dwelling-house of *Lewis Berry*, in *Whitestown*.

The defendant gave in evidence, under the notice subjoined to his plea, that the Court of Common Pleas of *Oneida* county had established gaol-liberties; that *Babcock* was admitted to the liberties on giving a bond with surety to the defendant, according to the statute. The *defendant then produced the record of the establishment of the liberties, which consisted of a *field-book*, containing the courses and distances of the lines

Do not the reputed liberties, in such a case, afford the best evidence of the actual liberties of the gaol?

(a) The law of escape, and the rights, duties and liabilities of the sheriff thereupon, are very fully considered in *Mandell v. Barry*, 9 *Johns. R.* 234. S. C. in error, 10 *Johns. R.* 663. See also *Jensen v. Ehlken*, 10 *Johns. R.* 549. *Dash v. Van Kleeck*, *infra*, 477. *Ransom v. Keyes*, 9 *Cowen*, 198. *Howland v. Swier*, *Id.* 91. *Meadis District Bank v. Dwyer*, 6 *Cowen*, 739. *Powers v. Wilson*, 7 *Cowen*, 374. *Jones v. Cook*, 1 *Cowen*, 309. *Brown v. Littlefield*, 1 *Wendell*, 398. *Poucher v. Holley*, 3 *Wendell*, 184. *Russell v. Turner*, *infra*, 189.

of the liberties; but the lines did not include the house of *Berry*, or the office of *Leavenworth*, where the prisoner was seen. To the field-book a map was attached, but it did not appear to have been made upon actual survey, nor were the office and house designated on the map; nor were any boundaries marked upon the map to denote that they were within the liberties; though it appeared probable that the map was intended to represent the house and office as being within the liberties. There was a manifest mistake in the courses and distances, for they could not be made to unite and come together, so as to include the gaol. The house and office were within the *reputed* liberties, and were universally so considered, until after the alleged escape; and the prisoner returned within the actual liberties before suit brought.

The judge charged the jury, that the facts entitled the plaintiff to recover, and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial; and the following points were raised, which were submitted to the court without argument.

1. The sheriff is not liable for an escape arising from an error in the Court of Common Pleas, in appointing the liberties of the gaol.

2. The *reputed* liberties being recognized by the plaintiff, he is bound by them.

3. The defendant is entitled to the benefit of the act passed the 8th of *April*, 1810, relative to gaol-liberties, &c.

Per Curiam. The escape charged in this case was by going into the office of *Reuben Leavenworth*, and into the house of *Lewis Berry*. The proof was, that those *places were within the reputed liberties, and were so understood, not only by all the prisoners, but by all other persons acquainted with the liberties, until after the alleged escape. It was further shown, that there must have been a mistake in the courses and distances contained in the field-book upon record, upon which the liberties were established, for they would not unite so as to include the gaol. There was also a map annexed to the field-book, and it appeared probable, but by no means certain, that the map was intended to represent the house and office as being within the liberties, though the courses and distances by the field-book would not include them. Upon these facts, it is difficult to rely upon the courses and distances as any certain guide; and the reputed liberties may, perhaps, be considered as affording the best evidence in the case, of the actual liberties of the gaol. But it is not requisite to go so far; for if the office of *Leavenworth* and the house of *Berry* be not within the liberties, the escape, by going into them, was at least inadvertent and involuntary, and a return from them into the actual liberties, before suit brought, was a good defence according to the decision in *Dole v. Moulton*, (2 *Johns. Cases*,

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205.) The case of *Tillman v. Lansing* (4 Johns. Rep. 45.) only applies to an escape voluntarily and knowingly made; and the weight of evidence in this case is clearly in favor of the allegation, that the escape, if any, by going into that office, was not wilful, but involuntary; and as the prisoner returned within the undisputed liberties before suit brought, the verdict ought to have been for the defendant.

In *Bissel v. Kip*, (5 Johns. Rep. 89.) it was observed, in the opinion delivered by the court, that going into *Leavenworth's* office was an escape. But the testimony in that case was direct and positive, that, upon no construction, would the liberties include that office, and the reputation of its being within the liberties was not supported by the aid of the map, and the arrest there was while *the prisoner was in the office, and before his return. Nor was the fact of going into the office material in that cause; for there was proof of an instance of wilful escape from the reputed, as well as from the actual, liberties.

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The verdict in this case must be set aside, and a new trial awarded, with costs to abide the event of the suit.

Motion granted.

KIP, Sheriff, &c., against BARCOCK and others.

v. Kip, ante,
same points.

THIS was an action brought by the plaintiff against the defendants, on a bond given as security for the liberties of the gaol, granted to *Babcock*, who was in custody on execution, at the suit of *Ballou*, the plaintiff in the preceding suit. The cause was tried at the *Oneida* circuit, the 11th June, 1810, before Mr. Justice *Spencer*.

The plaintiff offered, in evidence, the *nisi prius record* and *postea* in the cause of *Ballou v. Kip*, in which a verdict was found against the sheriff for the escape; this evidence was objected to by the defendants, but the judge ruled that the evidence was admissible and conclusive against the defendants in this suit, unless they could show fraud or collusion between the parties in the former suit. The present defendants had notice of that suit, and aided in the defence.

The same evidence was then given, as to the escape, &c., as was given in the last cause; and the jury, under the direction of the judge, found a verdict for the plaintiff.

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A motion was made to set aside the verdict and for a *new trial, which was submitted to the court without argument.

Per Curiam. The award of a new trial in the preceding

cause necessarily controls this case, for if the plaintiff be not liable for the escape, the defendants are not liable even to him upon their bond of indemnity. There was no more evidence, except the verdict itself, to establish the escape in this cause, than there was in the other. The verdict must, therefore, be set aside, and a new trial awarded, with costs to abide the event.

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HEARSEY
v.
PRUYN.

New trial granted.

HEARSEY against PRUYN.

IN ERROR, on *certiorari* from a justice's court. *Pruyn* brought an action against *Hearsey*, before the justice, as a toll-gatherer of the bridge of *Schenectady*, for demanding and taking of the plaintiff *toll*, over and above what was due, at three several times, to wit, the 13th *June*, 1809, 6½ cents for one load, the 14th *June*, 18½ cents for three loads, and 15th *June*, 6½ cents for one load, above the legal toll.

The defendant pleaded the general issue, with notice, and there was a trial by jury.

*It was proved that *Pruyn*, in *June*, 1809, paid *Hearsey* 12½ cents for passing the bridge with a load of plank; that he called on the witness, in presence of *Hearsey*, to take notice that the toll was overcharged, and that *Pruyn* owned a mill in the fourth ward of *Schenectady*. It was also proved that the plaintiff had carried from his mill, across the bridge, several loads of plank in *June*, and that the defendant admitted, that for all the loads of plank, which *Pruyn* had carried across the bridge, he had received 12½ cents *toll* for each load. It was also proved, that six cents only was exacted from another person, returning with a full load from market.

The plaintiff then gave in evidence, though it was objected to, an act of the legislature printed in a newspaper, under

According to the true construction of the second section of the act, passed the 29th March, 1809, relative to the *Mohawk* turnpike and bridge company, (sess. 32. c. 189.) the corporation

[* 180] cannot legally exact more than half-toll, or 6½ cents for crossing the bridge at *Schenectady*, with a wagon and two horses, &c. from the inhabitants of the city of *Schenectady*, or from persons going to and from mills, &c. &c. The discretion given to the corporation to mitigate the rate of tolls in

such cases, is to be exercised only in reducing them below one half The words in the act, "going to and from mills," comprehend saw-mills, as well as grist-mills.

An action may be maintained against an agent who has received money, to which his principal has no right, if the agent has had notice not to pay the money over; and in some cases, without such notice, if the money has not been actually paid over. (a)

It seems, that the right of a corporation to take toll may be tried in an action against the collector, where notice is given to him not to pay it over. (b)

If a plaintiff reads in evidence an act of the legislature from a newspaper, which is admitted by the court, and the defendant afterwards reads an exemplified copy of the same act; he cannot afterwards, on *certiorari*, allege for error, the admission of the act read by the plaintiff, though not legal evidence.

(a) Vid. *Frye v. Lockwood*, 4 Cowen, 454. *Ripley v. Gelston*, 9 Johns. R. 201. *La Farge v. Kneeland*, 7 Cowen, 460. *Mowatt v. M^c Clelan*, 1 Wendell, 173.

(b) The action in *Griffen v. House*, 18 Johns. R. 397. was brought against the toll-gatherer from all that appears in the case, without motion. Vid. *Ripley v. Gelston*, *ut sup.*

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which was the signature of *D. Tomilson*, treasurer of the *Mohawk Bridge Company*.

The defendant moved for a nonsuit, which was refused by the justice. The defendant then gave in evidence the exemplifications of several acts relative to the subject, among which was the act read by the plaintiff.

It was also proved that the defendant was duly appointed collector of the tolls by the treasurer, pursuant to a resolution of the company.

The jury found a verdict for the plaintiff below for 31 cents, on which the justice gave judgment.

The plaintiff in error insisted that the judgment below ought to be reversed.

1. Because the defendant in error was not exempted from paying toll.

2. That the right of the corporation could not be tried in an action against the collector of tolls.

3. That the action could not be maintained, without an express notice to the collector, not to pay over the tolls received by him.

Henry, for the plaintiff in error.

J. B. Yates, contra.

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*SPENCER, J., delivered the opinion of the court. The first section of the act of the 29th of March, 1809, (sess. 32. c. 189.) gives a toll for crossing the bridge, of 12½ cents for every burthen wagon drawn by two horses, &c. The second section declares it to be lawful for the president and directors to mitigate the rates of toll to the inhabitants of the city of *Schenectady* passing the bridge on foot, horseback, or in carriages of any description, not loaded, (500 pounds weight, exclusive of passengers, to constitute a load, to be determined by the opinion of the collector,) and also all mail, regular and extra stages, owned in said city, all wagons and sleighs employed in carrying firewood into the first and second wards of said city, passing either way, and on all loaded wagons belonging to the inhabitants of said city, passing said bridge, in their ordinary work on their lands or farms, or going to or from mills, or going to market with the produce of their farms, or returning therefrom, provided, that the toll demanded as above, shall not be more than one half the rate established by that act.

This section, though obscurely worded, is, I think, to be construed thus, when taken in connection with the proviso; all the inhabitants of the city of *Schenectady*, passing the bridge on foot, on horseback, or in any carriage, the load on which, exclusive of passengers, shall be under 500 pounds weight, to be determined by the collector, are liable to pay not more than one half the rates of toll established by the act;

and with respect to stages owned in the city, all wagons and sleighs employed in carrying firewood into the first and second wards, passing either way, and all loaded wagons belonging to the inhabitants of the city, passing the bridge in their ordinary work on their lands or farms, or going to or from mills, or going to market with the produce of their farms, or returning therefrom, are exempted by the act from paying more than one half the rates of toll, without reference to the weight of the loads. The discretion *vested in the president and directors, to mitigate the rates of toll, may or may not be exercised by them, in reducing them less than half; but in the cases specified, they cannot legally exact more than half the toll established by the act.

The plaintiff below was going to and from his saw-mill, at the time the full toll was exacted, and it has been made a question, whether a saw-mill comes within the description in the act, "of going to and from mills." It appears to me, that these terms include mills of every description, and I cannot perceive why saw-mills should not be deemed to answer the description as fully as grist-mills, or any other mills. The evidence offered by the plaintiff below, I also think was sufficient to enable the jury to decide, that he came within the exemption granted by the act. At all events, it cannot be said that there was no evidence of the fact, that when the full toll was exacted, the plaintiff below was going to and from his mill.

The second and third points may be considered together. The law is, I believe, well settled, that an action may be sustained against an agent, who has received money to which the principal had no right, if the agent has had notice not to pay it over; and, in some cases, the action has been sustained where no notice was given, if it appears that the money has not actually been paid over. (1 *Chitty*, pl. 25. *Cowp.* 565. 4 *Burr.* 1985. *Ld. Raym.* 1210. 4 *Term Rep.* 533. *Stra.* 490. *Bull. N. P.* 133.)

It is insisted, that the right to the toll taken is a franchise, and that it cannot be tried in an action against the agent; and in *Saddler v. Evans*, (4 *Burr.* 1985.) Baron Perrot recognized the doctrine, "that the right to an inheritance should not be tried in an action for money had and received, to be brought against the receiver." Lord Mansfield, in delivering the opinion of the court, does not sanction that principle, though the court approved *of the general principles adopted at the trial; his lordship said, "he kept clear of all payments to third persons, but where it is to a known agent: in which case, the action ought to be brought against the principal, unless in special cases, as under notice or *mala fide*."

I am of opinion, that in this case there was that notice; when the toll was paid, the plaintiff below called on a witness, in the presence of the defendant, to take notice that the toll

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was overcharged. This was sufficient to put the defendant on his guard, and implied that he meant to seek redress.

There was an objection to the justice's admitting a private act to be read from a newspaper. This objection would be fatal, did it not appear that the defendant read an exemplification of the same act. We are asked to go back to the point of time when the motion was made for a nonsuit; this we cannot do, but must judge from the whole record; and though the admission of the evidence was illegal, the defendant removed the objection by reading the exemplification. It has been frequently ruled here, that a party may thus commit himself by legalizing what was before illegal.

The judgment below must be affirmed.

Judgment affirmed. (a)

(a) See the general provisions in relation to exemption from tolls upon turnpikes, 1 R. S. 584. sec. 36.

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The privilege
granted by the
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second section
of the act, (sess.
32. c. 189.) in-
corporating the
Mohawk turn-
pike and bridge
company, to the
inhabitants of
Schenectady,
going to market
with the pro-
duce of their
farms, and re-
turning from
market, of pay-
ing only half
toll, is *personal*,
and is waived
if the person
carries, or
brings back
from the place
of market, the
goods of others;
and though he
carries the pro-
duce of his farm
to market, yet
if, on his return,
his wagon is
loaded in part with his own goods, and in part with the goods of others, he must pay full toll for the return load.

IN ERROR, on *certiorari* from a justice's court. This was also a suit in the court below, for taking more toll *for passing the bridge at *Schenectady* than the act allows. The only difference between this case and that of *Hearsey v. Pruyn*, is, that the plaintiff below, *Boyd*, alleged, that he was returning from market, where he had been with a load from the city of *Schenectady*, of which he is an inhabitant; and that 12½ cents toll were exacted from him. It appeared, that in passing the bridge to go to market, only 6½ cents toll was demanded and paid. The plaintiff, when the full toll was demanded on his return, told the defendant below that he was coming from market, and that if the defendant exacted full toll, the plaintiff would sue him for it. It was not clearly proved that the defendant had been to market with the produce of his farm; but receipts were produced, given by merchants in *Albany* for wheat delivered to them by the plaintiff. On his return, his wagon load weighed about 840 pounds, and consisted of goods, a part only of which belonged to himself, and the residue to other persons.

Henry. for the plaintiff in error.

J. B. Yates, contra.

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VAN NESS, J., delivered the opinion of the court. Two of the points made upon the argument have already been disposed of, in the judgment just pronounced in the cause of *Hearsey v. Pruyn*, and the only one remaining is, whether the defendant here was entitled, on his return from *Albany*, to pass the bridge for half toll. Admitting that he had carried to market a load of the produce of his farm, which I do not mean to question, I am of opinion that he was liable, notwithstanding, when he returned, to pay the full toll given in the first section of the statute. It is stated, that the defendant had upon his wagon a load weighing about 840 pounds, consisting of goods, some part belonging to himself, and **the residue to others*. The privilege of going to market with the produce of his own farm, and returning therefrom for half toll, is personal, and when he becomes a carrier for others, this privilege is waived, and the reason for the mitigation of the toll does not apply to him. The intention of the legislature obviously was, to give this indulgence to the farmers within the limits mentioned in the act; as the payment of full toll, considering the very frequent use they would make of the bridge, would be unreasonable and oppressive. This is clear, from the words of the act, which gives the exemption from paying full toll to those who pass the bridge when carrying the produce of their farms. It is not, however, to be understood, that they are obliged to return entirely empty. A reasonable interpretation must be given to the act, so as on the one hand, to secure to the corporation the toll to which they are legally entitled, and on the other, to protect those who use the bridge from imposition and extortion. The defendant, upon his return with a load of goods belonging to himself and others, cannot be deemed to come within the spirit and reason of the second section of the statute; and to permit him to pass the bridge under such circumstances, paying half toll only, would be a palpable violation of the legal rights of the corporation. The city of *Schenectady* already is, and is daily becoming more and more the place of deposit for goods, to be conveyed to the western and some of the northern counties in the state. That every farmer, when returning from market, may carry a load of goods and still be entitled to pass the bridge for half toll, would be giving the act a most unreasonable construction, and one which I am persuaded the legislature never contemplated. The court are of opinion, that the judgment below ought to be reversed.

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Judgment reversed.

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*JACKSON, *ex dem.* VAN ALLEN and others, *against*
VOSBURGH.

Parol evidence of a disclaimer of title to real property is inadmissible. (a)

Where an acknowledgment of tenancy on the part of the defendant in ejectment has been proved, he will not be allowed to give evidence to contradict or disprove the title of his landlord. (b)

Whether there be a tenancy or not, is a matter of fact; and *parol* evidence may be received to disprove it.

THIS was an action of *ejectment* for lands in *Kinderhook*. The cause was tried at the *Columbia* circuit, in *December*, 1809, before the *chief justice*.

At the trial, the plaintiff proved that *Barent Vosburgh* was in the possession of the premises, and died about 38 years ago. having, by his last will, dated in *December*, 1769, devised all his real estate to his son *Cornelius*, who continued in possession of the premises until, by his decd, dated in *June*, 1789, he conveyed the premises to *Van Allen*, one of the lessors, who took possession, and improved the land; and *Van Vleeck*, another of the lessors, also cultivated a part of the land.

It was also proved that the defendant, who came into possession after *Van Vleeck*, said, in 1799, that he had taken the lot of *Van Vleeck* and his brother, for one year; that at another time, the defendant said he would give up the possession to *Van Allen*, in the same way he had it of *Van Vleeck*; and that at another time, he refused to deliver up the possession, alleging that the land did not belong to *Van Allen*, but to his brother's children. The suit was commenced against *Herman Vosburgh* and *John A. Vosburgh*, and the latter died since the commencement of the suit, leaving children.

The defendant then offered to prove, that he had been in the actual possession of the premises in his own right for more than 30 years before the commencement of this suit, and that since the letting of the premises mentioned by the plaintiff's witnesses, *Van Allen* and *Van Vleeck*, two of the lessors, had disclaimed any right to the premises; but such disclaimer was not in writing, nor made to, or in the presence of the defendant. This evidence was overruled by the chief justice, who directed the jury to find a verdict for the plaintiff; and they found accordingly.

A motion was made to set aside the verdict, and for a new trial.

Van Buren, for the defendant. *Parol* declarations as to title to land, ought to be received with caution. But as there was only *parol* evidence in this case of the existence of a tenancy, *parol* evidence ought to have been admitted to disprove it. A tenancy created by *parol* may be discharged by *parol*;

(a) Acc. *Jackson v. Kisselbrack*, 10 Johns. R. 336. *Brant v. Livermore*, Id. 358. *Jackson v. Cary*, 16 Johns. R. 302. *Jackson v. Miller*, 6 Cowen, 751. S. C. 6 Wendell. 228. But see *Jackson v. Richards*, Id. 617. *Jackson v. Anderson*, 4 Wendell, 474. Vid. 4 Cowen, 587.

(b) *Supra*, 157. *Jackson v. De Walts*, and note. *Brant v. Livermore*, *ut sup.*

and it ought to have been left to the jury as a matter of fact. The evidence offered by the defendant was not to show an outstanding title, but to repel the evidence of tenancy given by the plaintiff. Tenancy or not, is a matter of fact.

Another question is as to the extent of the recovery in this case. One of the defendants died since the commencement of the suit. Though this is an action of trespass, yet it is to try the title; and the title of the deceased defendant did not come in question. (*Far v. Denn*, 1 *Burr.* 362.)

Sudam and *E. Williams*, contra. The first question was decided in the case of *Jackson*, ex dem. *Burr* and another, v. *Shearman*, (6 *Johns. Rep.* 19.) The court said, that these parol acknowledgments or declarations, as to title to real property, were a most dangerous species of evidence; and if admitted, would counteract the beneficial purpose of the statute of frauds; though it was said they might be received to show a tenancy, or to satisfy doubts as to a possession. Here the lessors had proved a title, and also a tenancy; and the defendant then offered to show a title out of the lessors; but having once acknowledged a tenancy, or the right of the landlord, he never can be allowed to set up any other title. (1 *Caines*, 444. 3 *Johns. Rep.* 504.) Parol evidence of possession is not sufficient to rebut the evidence of tenancy, unless accompanied with some paper title, to give color to the right of possession.

**Per Curiam*. The lessors of the plaintiff proved a possession of the premises in themselves and in those under whom they claimed, for upwards of 30 years. *Barent Vosburgh* was in possession of the premises as early as 1767 or 1768. He died about the year 1777, and devised his real estate to his son *Cornelius Vosburgh*. He succeeded to the possession of the premises, and in 1789 sold them by deed to *John L. Van Alen*, jun. He took possession, and used the premises for years, and then *Isaac I. Van Vleeck* took possession, and was in possession to 1799. These two last possessors are lessors of the plaintiff. In addition to this strong proof of title, it was shown, that in 1799 the defendant said he had taken the premises of *Van Vleeck*, one of the plaintiffs, for one year; and that at another time he offered to give up the possession to *Van Alen*, another plaintiff, in the same way he had it of *Van Vleeck*, but that at another time he refused, and denied the right of *Van Alen*.

To meet this testimony, the defendant offered to show that the two lessors, *Van Alen* and *Van Vleeck*, had disclaimed any right to the premises; but this disclaimer was not in writing, nor made to or in the presence of the defendant; and he offered further to prove, that he had been in the actual possession of the premises in his own right for more than 30

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years before the bringing of the suit. This testimony was overruled. Such a disclaimer as was here set up could be of no validity; and such evidence, if admissible, would lead to fraud and perjury, and be destructive of title to property. (6 *Johns. Rep.* 21.) The other evidence, which was overruled, went to deny and destroy the landlord's right, which a tenant, assuming him to be a tenant, is not permitted to do; (3 *Johns. Rep.* 504.) but it also went to disprove the fact of any tenancy; and in that view it ought to have been received, and it might have been material. On this single point, then, the motion to set aside the verdict is granted, with costs to abide the event of the suit.

Rule granted.

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*D. RUSSELL against T. TURNER, Sheriff, &c.

In an action on the case against a sheriff for an escape on *meine* process, the plaintiff can recover damages only for what he has lost by the escape, and the jury may find such damages as they may think the plaintiff has sustained, under all circumstances.

(a) If the plaintiff, having real and competent security from the defendant for his debt, relinquish it, after knowledge of the escape, the sheriff, in an action against him, may avail himself of this fact in mitigation of damages; and where the jury, in such a case,

THIS was an action on the case for an escape. The cause was tried the 18th October, 1809, before Mr. Justice Spencer.

It was proved at the trial, that a *capias ad respondendum*, returnable the second Monday of November, 1806, was delivered to the defendant, against one Abel Turner, Sylvester Russell and John Martin, at the suit of the plaintiff. Abel Turner alone was arrested and held in custody by the sheriff, and the other two defendants were returned not found. The plaintiff produced an exemplification of the record in the cause, by which it appeared, that a judgment had been obtained in November term, 1806, on the confession of Abel Turner, for 871 dollars and 36 cents, and which was signed and docketed the 20th December, 1806. A *test. ca. sa.* was issued on the judgment, directed to the sheriff of Rensselaer, and returned in November term, 1807, "not found." The plaintiff also proved, by the indenture between the defendant and L. Lansing, his successor in office, that the name of Abel Turner was not inserted among the names of the prisoners delivered over to the new sheriff; and it was admitted, that he was not delivered over by the defendant to his successor in office.

The defendant then proved, that about the 26th November, 1809, Abel Turner was arrested at the suit of the plaintiff, in Washington county, while on his way into Vermont, which was

gave nominal damages only, the court refused to set aside the verdict.

Whether, if the plaintiff had retained the security for the debt, the defendant could have availed himself of that fact, in his defence to an action for an escape? *Dubitatur.*

(a) Where a defendant arrested on *meine* process surrendered by his bail, and was permitted to go at large within the liberties, on giving a bond to the sheriff, which bond was afterwards assigned to the plaintiff, it was held, in an action on the bond for an escape, that the plaintiff was entitled to recover the whole debt due in the original suit; and at least as much as he had actually lost by the escape. *Kellogg v. Moore*, 9 *Johns. R.* 300.

the place of his residence; *Abel Turner* then gave a *cognovit* for \$71 dollars and 39 cents, on which the plaintiff relinquished to him a tract of land in *Vermont*, which he had received of the plaintiff as security, and which a witness testified, the plaintiff admitted was of more value than the debt; and the plaintiff then gave him a receipt in full of all demands, *except the suit in *Rensselaer* county. It was agreed that the execution was to be stayed for one year; and the plaintiff said he meant to charge the sheriff of *Rensselaer* county.

A. Turner was arrested by the sheriff of *Rensselaer*, and gave a bond the 5th *November*, 1806, for the liberties of the gaol; when he was arrested, he admitted that he owed the plaintiff about 800 dollars. He soon afterwards escaped, and went to *Vermont*. It was supposed there was a mistake in the name of one of the defendants in the writ on which he was arrested, and some evidence was offered to show the fact; but it was considered by the judge as wholly insufficient.

It appeared, that a notice had been given to the plaintiff in the suit against *A. Turner* and others, on the 5th *November*, 1806, to show cause before the chief justice why the defendant should not be discharged on common bail. This evidence the plaintiff objected to, as inadmissible, but the objection was overruled by the judge; who charged the jury, that the plaintiff ought not to recover more than the actual damages which he had sustained, of which the jury were to judge, and in the estimation of which they had a right to take into consideration all the circumstances of the case. The jury found a verdict for the plaintiff for *six cents* damages.

A motion was made to set aside the verdict, and for a new trial; 1. Because the judge admitted improper evidence; 2. For the misdirection of the judge; 3. Because the verdict was against evidence.

Allen and *Z. R. Shepherd*, for the plaintiff. In actions for an *escape*, on *mesne* process, the true inquiry is, What has the plaintiff lost? (*Potter v. Lansing*, 1 *Johns. Rep.* 215. *Rawson v. Dole*, 2 *Johns. Rep.* 454. *Gabel v. Perchard*, 2 *Anst. Rep.* 522. 3 *Anst. Rep.* 676.) He is entitled to recover the whole sum due to him in the original action. This rule is strictly enforced against sheriffs, who cannot avail themselves of any circumstances to avoid their responsibility, except the payment of the debt, or the insolvency *of the debtor. The sheriff could not set up, by way of defence in this action, any security which the plaintiff may have taken; neither can he avail himself of the fact of giving such security, nor of any agreement between the parties, made after he became liable for the escape. There was no evidence of any fraud on the part of the plaintiff. No fraud was pretended at the trial; nor did the judge take notice of any such suggestion. It does not appear for what cause *Abel Turner* was arrested in *Washington*

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county. It may have been for another debt. The jury gave the plaintiff mere nominal damages; when, by law, he was clearly entitled to the whole of his original debt.

Foot, contra. The plaintiff in this action is entitled to recover no more than what he had actually lost, at the time of the trial. There was no evidence of a debt due. The *cognovit* given under the circumstances of the case, proves nothing. It was an arrangement between the plaintiff and defendant in the original action, solely for the purpose of charging the sheriff with the payment of the money, in an action for the escape. It was a fraud on the sheriff. When the plaintiff has taken real and adequate security for his debt, the court, on motion, will discharge the defendant on filing common bail. If the plaintiff chooses, afterwards, to relinquish his security, he does it in his own wrong; he cannot resort to the sheriff.

In an action of *tort*, sounding in damages, a new trial is not granted, because the damages found by a jury may be thought too little or too much.

THOMPSON, J., delivered the opinion of the court. This is an action on the case, brought against the sheriff for the escape of a prisoner, in custody on *mesne* process, and the question now before the court is, whether it was competent for the sheriff to show that the plaintiff *had, after he knew of the escape, relinquished to the prisoner real security for the debt, which he held in the state of *Vermont*, with a view to recover his demand from the sheriff.

The true question in cases of this kind is, What has the plaintiff lost in consequence of the escape? (1 *Johns. Rep.* 223. 2 *Johns. Rep.* 454.) The jury are not confined to the exact damages in the final judgment, or to the amount of the plaintiff's demand, but have a power and discretion to assess such damages as they shall suppose the plaintiff has sustained, under all circumstances. (2 *Wils.* 295.) This is a doctrine well settled, both in our own and in the *English* courts; and, according to which, I see no objection to the competency of the evidence offered in this case. The value and extent of this security was a proper subject for the consideration of the jury, and could the plaintiff have shown it to be worth little or nothing, it would not have mitigated the damages. As the testimony, however, appeared before the jury, it was sufficient to pay the plaintiff's demand. It is admitted by the plaintiff's counsel, and, indeed, could not be denied, that the insolvency of the prisoner, or payment of the demand by him, could be given in evidence in mitigation of damages. On what principle could this be done? None other, certainly, than to show how far the plaintiff had been, or was likely to be, damaged. If the prisoner had deposited with the plaintiff a sum of money to satisfy his demand, when ascertained by judgment,

and the plaintiff, on discovering that an *escape* had been made, had surrendered up the money, could it be doubted that the sheriff might avail himself of it in mitigation of damages? Or suppose the suit upon a bond which was secured by mortgage on real property, and the creditor, on discovering the escape, should discharge the mortgage, would not this circumstance be admissible in mitigation of damages? All these cases depend on the same principle, and necessarily *result from the nature of the action, which is given to the plaintiff by way of indemnity, for the actual injury which he sustains by reason of the escape; and the plaintiff ought not to be permitted to avail himself of his own acts, or misconduct, to enhance the damages. The action is founded in good policy, as being calculated to make sheriffs vigilant in the execution of their duty. But it would be the extreme of injustice, to permit the creditor to relinquish a security held from the debtor, for the purpose of charging the sheriff. If *A. Turner* had actually paid the money to the plaintiff, with equal propriety might he refund it, and resort to the sheriff. This, according to my view of the case, would be as illegal as it would be unjust. I know of no principle of law to warrant such a position. It would be permitting a man to avail himself of his own misconduct, to the prejudice of another. The situation of the sheriff is analogous to that of a surety; and the law will not tolerate, or endure, any connivance between the creditor and principal debtor, to the prejudice of the surety. Had the plaintiff not relinquished the real security which he had in his hands, for the debt, but still held it, I am not prepared to say it would have been a complete defence for the sheriff. But I am inclined to think, the Court of Chancery would have compelled the plaintiff to assign that security to the defendant, for his indemnity. The plaintiff having put the security out of his hands, no such relief can be obtained. And the only mode in which the defendant can avail himself of the plaintiff's misconduct in this respect, is in mitigation of damages.

The motion for a new trial must, accordingly, be denied.

SPENCER, J., not having heard the argument in the cause, gave no opinion.

Rule refused.

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*JACKSON, *ex dem.* COLDEN and others, against RICH.

Any matter arising since issue joined in a cause, and which might have been pleaded *purs darrein continuance*, must be so pleaded, and cannot be given in evidence at the trial

THIS was an action of ejectment, tried at the *Washington* circuit, in *June*, 1810, before Mr. Justice *Van Ness*.

The plaintiff claimed the premises for breach of a covenant contained in a lease, made by *Alexander Colden*, under whom the plaintiff claimed, to *James Hay*, dated the 29th *March*, 1804, for the term of 21 years. The lessee covenanted, for himself, his executors, administrators and assigns, that if he should transfer the lease to any person, or desert the premises, any rent being in arrear, or should, at any time during the term, suffer or permit more than one family or tenant to every one hundred acres, to reside on, use or occupy, any part of the premises, that then, in every such case, the lease should be null and void, &c. The farm demised contained 105 acres, of which 14 acres were in possession of the defendant. The plaintiff proved that, at the commencement of the suit, the premises were occupied by three families.

The defendant offered to prove that on the 3d *July*, 1807, and since the issue was joined in this cause, it was agreed between the lessors and the defendant, by *John Cowan*, under whom the defendant held, that the defendant should surrender up the premises to *Colden*, one of the lessors; and be discharged and acquitted from all damages, costs and charges, to which he might be subject, in consequence of the suit, and that the said lessor should pay the defendant thirty dollars, and that, in pursuance of that agreement, the defendant did, by his deed, on the 11th *July*, 1807, surrender and yield up the premises to *Cowan*, who, at the same time, did, by his deed, grant and surrender up the premises to *Colden*, which deed of surrender was *accepted and received by *Colden*, &c. This evidence was overruled by the judge, who directed the jury to find a verdict for the plaintiff; and the jury found a verdict accordingly.

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A motion was now made to set aside the verdict, and for a new trial. The case was submitted to the court without argument

Per Curiam. There can be no question as to the forfeiture of the lease. There was to be but one family or tenant for every 100 acres, and there were three families on the premises, which contained only 105 acres. The sense of the court on this covenant was before expressed in two different causes, brought by the same plaintiff. (1 *Johns. Rep.* 267. 273.) The matter arising since issue was joined, was properly rejected. Many terms of this court had intervened since it arose, and the rule is well settled, that matter arising after

issue joined, and good by way of plea *puis darrein continuance*, must be pleaded without delay. The very name and form of the plea show that it must be pleaded as arising *since the last continuance*. (a).

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The motion to set aside the verdict is, therefore, denied.

(a) It rests in the discretion of the court to receive a plea *puis darrein continuance*, or not, even after more than one continuance between the time that the matter of the plea arose and the coming in of the plea. *Morgan v. Dyer*, 10 Johns. Rep. 163.

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THIS was an action of *debt*, on a bond, dated 20th *October*, 1808, for 2,174 dollars, conditioned to pay 1,087 dollars, on the 1st *November*, 1811; with the interest thereon annually. The defendant pleaded, 1. *Non est factum*. 2. That at the commencement of the suit, there was due and owing to the plaintiff a sum less than 400 dollars, to wit, 76 dollars and 9 cents, and no more; and that the plaintiff, at the time of commencing the action, was indebted to the defendant in the sum of 400 dollars, upon a certain note, or agreement in writing, made the 29th *October*, 1808, by the plaintiff to the defendant, by which the plaintiff promised, for value received, to wit, in consideration of the aforesaid sum, given by the defendant to the plaintiff, to deliver to the defendant sixteen shares of 25 dollars each, in the third great western turnpike road company, on or before the 1st *March*, 1809, which note was and is still due and unsatisfied, and the money due thereon exceeds the sum of 76 dollars and 9 cents, due on the bond, which said sum, or so much thereof as may be necessary, the defendant sets off against the said 76 dollars and 9 cents, so remaining due on the bond, &c. 3. That before the making the bond, &c., it was corruptly, and against the force of the act in such case made and provided, agreed between the plaintiff and defendant, that the plaintiff should lend the defendant 687 dollars, to be repaid on the 1st *November*, 1811, with interest, and that the plaintiff should forbear and give time to the defendant to pay the said 687 dollars, until the 1st *November*, 1811, and for such forbearance, &c. the defendant should buy and purchase of the plaintiff 16 shares of the stock of *the third great western turnpike road company, to be delivered, &c., at and for the

In action of debt on a bond, dated *October* 20, 1808, conditioned to pay 1,087 dollars, the defendant pleaded, that it was corruptly agreed between the plaintiff and the defendant, that the plaintiff should lend the defendant 687 dollars, to be repaid on the 1st *November*, 1811, and that the plaintiff should forbear and give time for the payment of the 687 dollars, to the 1st *November*, 1811, and for such forbearance, the defendant should purchase of the plaintiff sixteen shares of turnpike stock, to be delivered, &c. for 400 dollars, when in truth and fact, the shares were worth only 250

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dollars; and that pursuant to such corrupt agreement, he did purchase the said shares, &c., and that the defendant executed the bond, as well for the 687 dollars so lent, as for the 400 dollars, to be paid for the shares and for the forbearance of the 687 dollars, &c.

On a demurrer to this plea, the bond was held to be usurious and void.

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sum of 400 dollars, when, in truth and fact, the true and market price of the shares was only 250 dollars, &c., and that the defendant should execute the said bond, as well for the said sum of 687 dollars, as for the payment of the said 400 dollars for the said shares and the forbearance, &c. And that, in pursuance of such corrupt agreement, &c.

To the second plea, the plaintiff replied, that he tendered to the defendant the sixteen shares of the turnpike stock, on the day, &c., but the defendant then and there refused to receive, &c., and was, and is, ready and willing to deliver to him the said shares, &c.

To the *third* plea, the plaintiff demurred specially, and the defendant joined in demurrer; and the same was submitted to the court without argument.

VAN NESS, J., delivered the opinion of the court. The truth of the facts stated in this plea is admitted by the demurrer, and the question then arises, whether, the sale of the stock being merely colorable, the contract is not founded in usury. Each share of the stock is admitted, by an endorsement upon the pleadings, to be of the nominal value of 25 dollars; and this fact, independently of such admission, is necessarily inferrible from the plea. The plea expressly avers, that the shares stipulated to be transferred by the plaintiff, were worth but two hundred and fifty dollars, and that it was corruptly and usuriously agreed, that the defendant should take them at their nominal value, being 400 dollars; and this sum, together with 687 dollars in money, is the amount of the bond upon which this suit is brought.

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Upon this statement of facts, there can be no doubt that the bond is void. The cash lent to the defendant was upon the ground that the defendant should pay nearly double the real value of the stock, and interest is reserved upon the whole amount. Whether this was a **bona fide* sale of the stock, or colorable only, is a fact which the plaintiff may put in issue if he pleases; and it is for the jury to decide upon it. (a) If they find that it was a fair sale, then the defendant may be liable to pay the whole amount of the plaintiff's demand; but if, on the contrary, they shall be of opinion that the transfer of the stock was a mere device, to obtain an extravagant and unlawful interest, the bond is usurious, and, consequently, void. (b) (*Tate v. Williams*, 3 Term Rep. 538. *Doe*, ex dem.

(a) Whether usury or not, is a question of fact for the jury to decide. *Smith v. Brush*, 8 Johns. Rep. 84. But see *Lery v. Gadsby*, 3 Cranch, 180. *N. Y. Firemen Ins. Co. v. Ely*, 2 Cowen, 678.

(b) "If the evidence before the jury exhibited a transaction, the substance of which was to borrow on the one part and lend on the other, at a greater rate of interest than seven per cent. per annum, and if this entered into the concoction of the bargain, then, undoubtedly, the transaction was usurious." Per *Spencer, J.*, delivering the opinion of the court in *Dunham v. Dey*, 13 Johns. Rep. 45. Vid. *Rice v. Mather*, 3 Wendell, 62. *Bank of Utica v. Wager*, 2 Cowen; 712.

Davidson, Ex'r., v. Barnard, Assignee, &c. 1 *Esp. Rep.* 11. *Moore v. Battie, Ambler*, 371.) 'There must be judgment for the defendant, with leave to the plaintiff to withdraw the demurrer, and take issue on the plea.

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v.
RICHLY

Judgment for the defendant.

BLANCHARD against RICHLY.

IN ERROR, on *certiorari* from a justice's court.

Richly sued *Blanchard* in the court below, in an action of *assumpsit*, for work.

The defendant below pleaded a former trial, for the same cause of action, before the same justice. The justice, in his return, stated, that, knowing the facts of the former trial, and that he had nonsuited the plaintiff, he declared the nonsuit to be no bar. The defendant then pleaded payment, and demanded a *venire*, which was issued, and delivered to the defendant. The cause was adjourned, and on the day of adjournment, the parties appeared; but no jury came, nor was the *venire* returned. The defendant demanded a nonsuit, unless the jury appeared; *but this was overruled, and the defendant did not request another *venire*. The justice proceeded to try the cause, and gave judgment for the plaintiff, for 5 dollars and costs.

The errors assigned were,

1. The defendant having pleaded a former trial, the justice had no right to overrule the plea for any cause not proved, but resting in his own knowledge.
2. That a *venire* having been issued, the justice could not afterwards proceed to try the cause.

Per Curiam. The application of the defendant was to nonsuit the plaintiff on account of the *venire* not being returned. This motion was rightly overruled. The default would not entitle the defendant to have the plaintiff nonsuited. Another *venire* might have been issued, within the case of *Day and Wilber*; (2 *Caines*, 137.) (a) but this the defendant did not ask, and his proceeding to trial would be considered a waiver of a trial by jury. (b)

(a) *Sebring v. Wheeldon*, 8 *Johns. Rep.* 460. acc.

(b) When the party makes no objections to the pleadings at the time, but consents to go to trial, he shall not avail himself subsequently of any defect of form. *McNeil v. Scofield*, 3 *Johns. Rep.* 437. A party cannot successfully claim any right which he has waived or failed to assert at the proper period. Vid. *Kilmore v. Sudam*, *infra*, 529. *Rowley v. Stoddard*, *infra*, 207. *Coon v. Snyder*, 19 *Johns. Rep.* 384. And if a party, having the means of defence in his power, neglect to use them, he is for ever precluded. 6 *Johns. Rep.* 510.

In an action before a justice, the defendant is not entitled to a *nonsuit*, because the *venire* is not returned at the time appointed for trial; but another *venire* may be issued; and if the defendant does not demand another *venire*, but goes to trial before [* 199] the justice, it is a waiver of the trial by jury.

Where the defendant pleaded a former trial before the same justice for the same cause of action; and the justice stated, from his knowledge, that the plaintiff was nonsuited at such former trial, and that it was no bar, and the defendant did not deny the statement, but went to trial, he was held to be concluded as to the fact.

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HENLOW
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With respect to the other objection, it is true, the justice could not make any facts within his own knowledge the basis of any judicial decision. But on the defendant's interposing the plea of a former trial, the justice answered, that the former trial was before him, and it was only a nonsuit, which would not be a bar to this action. The defendant did not deny the statement made by the justice. He must, therefore, be deemed to have admitted that the former trial, which he had pleaded, was one in which the plaintiff was nonsuited; and if so, the justice was correct that it was no bar to the present suit. Judgment must, accordingly, be affirmed.

Judgment affirmed.

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*HENLOW *against* LEONARD.

Where a cause before a justice was tried by a jury, and after the jury had retired to deliberate on their verdict, they sent to the justice, requesting that a witness who had been previously sworn in the cause, might be sent to them, or that they might come into court, in order to ask the witness some questions, and the justice asked the parties if they would go to the jury, that the witness might be examined, and the defendant refused; and the justice permitted the witness to go into the jury room, and stood at the door while he was examined, and then retired with the witness; and the jury afterwards came into court and set aside the verdict.

IN ERROR, on *certiorari* from a justice's court.

Leonard brought an action of *assumpsit* against *Henlow*, before a justice of the peace. The defendant, after issue joined, demanded a trial by jury; and after the jury had retired to consider on a verdict, they sent the officer to the justice, requesting that one of the witnesses who had been sworn in the cause might be sent to them, or that they might come before the justice, for the purpose of asking the witness some further questions. The justice asked the plaintiff and defendant if they would go with him to the jury, or have the jury sent for into court, to be satisfied by the further examination of the witness. The defendant said he would have no more to do with the suit; and the justice told the plaintiff it would be proper that the jury should question the witness, and accordingly permitted the witness to go into the room where the jury were sitting, and the justice stood at the door until the jury had examined the witness, and then retired with the witness. The jury, after some time, came into court, and found a verdict for 4 dollars and 89 cents, in favor of the plaintiff, and the defendant, in open court, declared himself satisfied with the verdict; and the justice gave judgment on the verdict.

Per Curiam. There is no question in this case as to the justice and merits of the verdict. The plaintiff in error contends that there was an irregularity in the justice's going with the witness to the jury, at their request. But as this appears to have been done openly, after notice to the parties, and as

and found a verdict for the plaintiff; this was held not to be a sufficient irregularity to

we may fairly presume, in their presence, there was no ground of complaint. The case of *Thayer v. Van Vleet* (5 Johns. Rep. 111.) bears strongly on this point. We are of opinion that the judgment ought to be affirmed.

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THE PEOPLE
v.
BABCOCK.

Judgment affirmed. (a)

(a) Vid. *Bunn v. Croul*, 10 Johns. Rep. 239. *Taylor v. Eatsford*, 13 Johns. Rep. 487. *Blackley v. Sheldon*, supra, 32. et not.

*THE PEOPLE against BABCOCK.

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THE defendant was convicted at an *Oyer and Terminer*, held in *Oneida* county, in *June* last, of a *cheat*. The indictment stated, that one *Rufus Brown* and *Ira Dickinson* had obtained a judgment before one of the justices of the peace, in and for the county of *Oneida*, against *Babcock*, and that the said *Babcock*, being an evil disposed person, on the 4th of *August*, 1807, at, &c., falsely, fraudulently and deceitfully, and by false arts, colors and pretences, did obtain, acquire, and get into his hands and possession, of and from the said *Rufus Brown*, who was a partner with the said *Dickinson*, and had a joint interest with the said *Dickinson* in the said judgment, a certain paper writing, being a receipt for eighteen dollars, and discharge of the said judgment in the words and figures following: "Mr. *Reuben Leavenworth*, Esquire, Sir, I have received of *Oliver Babcock* eighteen dollars, for that judgment obtained before you, in favor of *Rufus Brown* and *Ira Dickinson*, and wish you to discharge the same by the said *Babcock's* paying the cost. *Utica*, *August* 4th, 1807. *Rufus Brown*;" under color and pretence that he, the said *Babcock*, would then and there pay ten dollars in cash immediately towards the said judgment, and give his note for the residue immediately, and under pretence that he had the money in his pocket; and that the said *Babcock* did then and there fraudulently and unlawfully carry off the said paper writing without paying the said ten dollars, which he pretended that he was then and there ready to pay, and without giving his note for the residue as aforesaid, with an intent to deceive and defraud the said *Rufus Brown*, and also with having obtained the receipt falsely, fraudulently and deceitfully, and under false acts, colors and pretences, and under pretence that he had the money in his pocket, and would pay it immediately, and give his note for the residue, it was held that there was no *false token*, but only a false assertion, and that an indictment would not lie. (a)

To constitute a *cheat* or fraud, an indictable offence at common law, it must be such a fraud as would affect the public; such a deception that common prudence cannot guard against; as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. Where A. had a judgment against B., and B. came to A. and said he would settle it, by paying money in part, and giving a note for the residue, on which A. drew a receipt in full in discharge of the judgment, and B. got possession of the receipt without paying the money or giving the note; and the indictment charged him

(a) *People v. Miller*, 14 Johns. R. 371. acc. The statute making it penal to obtain money, &c. on false pretences, vid. 9 R. S. 677. s. 53. has extended the common law offence, and introduced a new rule of law *People v. Johnson*, 19 Johns. 292. *Lambert v. The People*, 9 Cowen, 578.

NEW-YORK, the said *Ira Dickinson*, of the *money due by virtue of the
Nov. 1810. judgment aforesaid, to the great damage, &c.

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Gold moved in arrest of judgment, on the ground that the offence, as charged, was not indictable at common law. Words or assertions, however artful and false, if unaccompanied with such visible and false tokens as may affect and deceive the public at large, will not amount to an indictable offence. In the case of *The King v. Wheatley*, (2 Burr. 1125. See *Rex v. Young*, 3 Term Rep. 104. 6 Mod. 42. *Sayer*, 146. 1 *East's Rep.* 185. 2 *Stra.* 866. 6 Term Rep. 565.) Lord Mansfield held that the offence, to be indictable, must be such a one as affects the public; as if a man uses false weights and measures, and sells by them, or uses them in the general course of his dealings; so if he defrauds another, under false tokens; for these are deceptions against which common prudence cannot sufficiently guard. Mr. *East*, (2 *East's C. L.* 816—834.) in his *Treatise on the Crown Law*, has adopted this distinction between such frauds or cheats as are indictable, and such as are not. He has examined all the cases on the subject, and shown most clearly, that a private cheat, though accompanied with false assertions, is not indictable. He has laid down a rule, extracted from a confused mass of cases, which will furnish an easy and sure guide in regard to such offences.

Van Vechten, Attorney General, and *N. Williams*, contra. Since the statutes relative to obtaining money or goods by false tokens, or under false pretences, there are very few frauds that do not come within the purview of that statute. For this reason, we find very few modern cases, of indictments at common law for such cheats. But indictments in cases like the present are to be found in the more ancient books, and are supported by the principles laid down by some of the best elementary writers.

Hawkins (*Hawk. P. C. c.* 71. s. 1.) says, those cheats "which are punishable at common law, may, in general, be described to be deceitful practices in defrauding or endeavoring to defraud *another of his own right, by means of some artful device, contrary to the plain rules of common honesty; as by playing with false dice, or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written," &c.

Blackstone (4 *Comm.* 157.) classes cheating among offences against public trade, which are indictable; and he says, "Any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment and the pillory."

Comyn, (4 *Com. Dig.* 554. *Justices*, B. 32, 33.) in his *Digest*, says, "Justices of the peace may inquire of any thing

done to the fraud or deceit of another; as if a man read a writing to an illiterate person, in other words than those in which it is written, by which means he seals it." (1 Sid. 312. 431.)

Lord Holt (*Comb.* 16.) said, "that all cheats and abuses of tradesmen are indictable." And in *Rex v. Wheatley, Wilmot*, J., said, "that where false tokens are produced, or such methods taken to cheat and deceive, as people cannot, by ordinary care and prudence be guarded against it, is an indictable offence."

In the case of *The Queen v. Crisp*, (6 Mod. 175.) an indictment was held to lie for tearing an account, after it was signed and settled; and the indictment charged that A. got it into his hands *per falsas et sinistras insinuationes*, and *vi et armis* tore it, &c. A motion was made in that case to quash the indictment, because it was a *private* offence, but the court denied the motion.

In the case of *The Queen v. Mackerty and another*, (2 Lord Raym. 1179. 6 Mod. 201. S. C. *Noy's Rep.* 103.) the defendants were indicted for selling wine for *Lisbon* wine, when it was not; one of them pretending to be a wine merchant and a dealer in *Lisbon* wine, when he was not, affirmed it to be *Lisbon* wine, and obtained from the party a quantity of hats; and the indictment was held to lie. The court said there was enough set out in the indictment to show the defendants to be cheats. Mr. East treats this as a case of a *conspiracy*; but there is nothing in the indictment to warrant that assertion. (*Cr. Circ. Ass.* 270.) He thinks the indictment must be for a conspiracy, or for using false public tokens, as false dice, false measures, &c., but in the cases he has cited, it is declared that false dice or false tokens, &c., may be adopted as different modes of cheating. Independent of the statute, an indictment would lie at common law for cheating with *false tokens*, though not for *false pretences*. (3 Inst. 133. 4 Bl. Comm. 159, 160.) In regard to the former, the statute of 33 Hen. VIII. merely authorized corporal punishment to be inflicted; but it was before punishable by fine and imprisonment. It is true, no indictment lies for a cheat effected by a bare naked lie; and such are the cases cited by East, in support of his doctrine; but it is otherwise, where there is an artful contrivance, against which common prudence could not well guard. There are precedents of indictments also to be found in cases similar to the present. (*Dog. Cr. Cir. Comp.* 288. *King v. Jones*, 1 Leach, 161.)

Per Curiam. Lord Kenyon said that the case of the *King v. Wheatley* (2 Burr. 1125.) established the true boundary between frauds that were, and those that were not indictable at common law. That case required such a fraud as would affect the public; such a deception that common prudence

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and care were not sufficient to guard against it, as the using of false weights and measures, or false tokens, or where there was a conspiracy to cheat. Thus in the case of *Jones*, (1 Salk. 379.) who obtained money of *A.*, pretending to have a command from *B.*, whereas *B.* did not send him; but as he came with no false token, it was held not to be indictable. The offence was nothing more than telling a lie. So in the case of *The King v. Lara*, (6 Term Rep. 565.) the defendant got possession of certain lottery tickets, the property of *A.*, pretending that he wanted to purchase them, and he delivered to *A.* a fictitious order on a *banker, knowing that he had no authority to draw it, by means of which he got possession of the lottery tickets. On the argument in arrest of judgment, it was admitted, that as this was a fraud upon a private individual, the prosecutor must show that the fraud was effected by means of a false token, as well as a false pretence, and one of such a nature as that ordinary prudence could not guard against it. The counsel for the crown contended, that the false pretence was the alleged wish to purchase, and the false token was the order. But the court said that there was no false token; that it would be ridiculous to call the check a false token, and that all depended upon the credit due to the defendant's assertion, and the judgment was arrested.

In the present case, we search in vain for the *false token*. There was nothing beyond the defendant's false assertion that he was ready to pay the judgment. There was not even the production of either note or money; and common prudence would have dictated the withholding of the receipt until the money was paid and the note drawn. To support this indictment would be to upset established principles.

The judgment must, therefore, be arrested.

Judgment arrested.

NEW-YORK,
Nov. 1810HOWARD
v.
EASTON.HOWARD *against* EASTON.

IN ERROR, from the Court of Common Pleas of *Oneida* county.

Easton brought an action of *assumpsit* against *Howard*, in the court below. The declaration stated, *that on, &c., at, &c., a certain conversation was had between the parties, relative to the sale of the possession, and improvements made by the plaintiff, of a tract of 150 acres of land, in lot No. 3, in the *Oriskany* patent, in which conversation it was then and there agreed, that in consideration that the plaintiff promised and agreed to sell and deliver up to the defendant, the *possession* and *improvements* made by the plaintiff on the said lot of land, &c., he, the defendant, then and there undertook and promised to pay the plaintiff *sixty* dollars, unconditionally, and the further sum of *forty* dollars, on condition that a certain ejectment then depending in the Supreme Court, against *Easton*, at the suit of *Jackson*, ex dem. *Gephard* and others, should not be decided against *Easton*. The plaintiff averred, that in pursuance of the said contract, he afterwards, to wit, on, &c., delivered up to the defendant his possession and improvements, on, &c.; and further averred, that the said suit, &c., was not decided against the plaintiff, but that a judgment of nonsuit was entered in *August* term, 1809, against the plaintiff in that suit, yet the defendant, &c.

A contract for the sale and delivery of the possession of land, and the improvements thereon, must be in writing; otherwise, it is within the statute of frauds. Possession is *prima facie* evidence of title; and is an interest in land, within the statute. (a)

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The defendant pleaded *non assumpsit*.

At the trial, in the court below, the plaintiff offered witnesses, to prove the contract stated in the declaration, it being admitted that there was no note or memorandum of the agreement in writing. The defendant objected to any parol evidence of the contract; but the court overruled the objection; and admitted the parol proof of the contract; and the jury found a verdict for the plaintiff. A bill of exceptions was tendered to the opinion of the court below, on which a writ of error was brought to this court.

The cause was submitted to the court without argument.

Per Curiam. Here was an agreement to sell and deliver possession, as well as the improvements upon land; *and possession must be considered as an *interest in land*, within the meaning of the statute of frauds, so as to render the contract

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(a) But a promise to pay for improvements merely, though by parol, is not within the statute. *Freer v. Hardenbergh*, 5 Johns. R. 272. *Benedict v. Beebe*, 11 Johns. R. 145. *Lower v. Winters*, 7 Cowen, 263. But if the consideration of the promise is partly within the statute, it will invalidate the whole contract. *Van Alstyne v. Wimple*, 5 Cowen, 162.

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void, as not having been reduced to writing. Possession is *prima facie* evidence of title, and no title is complete without it. The judgment below must, therefore, be reversed.

Judgment reversed.

ROWLEY against R. STODDARD, jun., who is impleaded with STODDARD.

Where two are bound jointly and severally, a release of one discharges both; but a covenant with one of the obligors not to sue him, does not discharge the other obligor; a release of one must be a technical release under seal, in order to discharge both. A receipt in full given to one, on his payment of half, is no release of the other debtor.

(a) Appearance in a suit waives all irregularity to notice.

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THIS was an action of *debt*, on a judgment obtained in the state of *Vermont*.

The defendant *R. Stoddard, jun.* was arrested on a *cap. ad resp.* and the other defendant returned not found. The defendant pleaded *nil debet*, with notice that he should give in evidence, at the trial, that he was an infant at the time the note was made, on which the judgment was obtained.

The cause was tried at the *Albany* circuit, *April*, 1810, before Mr. Justice *Thompson*.

By the record of the judgment, produced at the trial, it appeared, that it was rendered the 24th *February*, 1806, for 183 dollars damages, and 36 dollars and 60 cents costs; that the action was on a note made by the defendant the 21st *April*, 1803, for 200 dollars, payable in two years; that the defendant pleaded the general issue, and gave notice that he should give in evidence the infancy of *R. Stoddard, jun.*; and the jury found a verdict for the plaintiff.

It was proved, that on the 30th *January*, 1806, a person, as agent of the elder *Stoddard*, went to *Vermont* to settle with the plaintiff, the suit having been commenced *there by an attachment of the property of the elder *Stoddard*. A settlement was accordingly made, and 100 dollars were paid, on which the plaintiff gave a receipt in full of all demands against the elder *Stoddard*. It was agreed, at the time, that the plaintiff might proceed in his suit, for the purpose of having the

(a) *Acc. Catskill Bank v. Messenger*, 9 Cowen, 57. *Bank of Chenango v. Osgood*, 4 Wendell, 607. The remark of the court in *Jackson v. Stackhouse*, 1 Cowen, 122. that a covenant not to sue operates as a release, contemplated a covenant with all the parties liable to be sued. In *Phelps v. Johnson*, 8 Johns. R. 54. though both the parties liable to suit were not parties to the covenant, yet the person not named was looked upon by the court in the light of a *cestui que trust*, whose equitable interest they were bound to protect, and for whose benefit the covenant was made. *Bank of Chenango v. Osgood*, 4 Wendell, 612. A covenant never to sue a sole obligor is pleadable in bar to prevent circuity of action; but such a covenant for a given time is a mere promise, and cannot be pleaded in an action on this bond, the remedy of the party being by suit on the covenant. *Chandler v. Herrick*, 19 Johns. R. 129. *Winans v. Huston*, 6 Wendell, 471. A covenant not to sue a prior endorser operates as a release to the subsequent endorsers. *Brown v. Williams*, 4 Wendell, 360.

property attached sold, and that no defence was to be made to the suit. *Stoddard, jun.*, being present, it was questioned whether he was of age when he gave the note; and he then, being of full age, agreed to pay 100 dollars, being the half of the rent of a farm, for which the note was given. It was proved that 30 acres of wheat had been attached; and that, in *October*, 1809, the plaintiff admitted he had received wheat enough to pay the rent due; the wheat belonged to *Stoddard, jun.*, who promised to pay his part of the note.

An execution issued on the judgment was produced, by which it appeared, that 136 dollars and 60 cents was endorsed, in part satisfaction, being the amount of the appraisement of the wheat in *May*.

Under the charge of the judge, the jury found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, on the following grounds:—

1. That the discharge of one defendant was the discharge of both.

2. That the defendant *Stoddard, jun.* was an infant when he made the note, on which the judgment was rendered in *Vermont*.

3. That *Stoddard* the elder not being in *Vermont* when the suit was commenced, nor served with process, the judgment could not be enforced here.

4. That the verdict was against evidence.

H. Bleecker, for the defendant. When two are bound jointly and severally, a release of one discharges both; for where the joint remedy is gone, the several remedy *is also lost; (2 *Salk.* 574. *Co. Lit.* 232. a. and note 1.) and this need not be a mere technical release, but a discharge in law is sufficient. (*Hob.* 70. *Cro. Eliz.* 762.) The plaintiff in the original suit must have recovered against both defendants, or not at all. By the discharge, therefore, of one, his action is lost.

2. The defendant *Stoddard* the younger was an infant when he made the note. To take away this legal objection, the new promise after he came of age must be the same as the original promise, and a confirmation of it; but here the new promise was to pay half the rent, not to pay the note. A promise to pay 100 dollars' rent is not a promise to pay a note for 200 dollars.

3. The elder *Stoddard* was in this state, and was never served with process; the suit was commenced by the attachment of property, without any personal summons or actual notice. No action, therefore, can be maintained in this state on the judgment recovered in *Vermont*. (*Kilburn v. Woodworth*, 5 *Johns. Rep.* 37.)

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4. There was evidence that the plaintiff's demand had been fully satisfied.

Rodman, contra. 1. The receipt given to the elder *Stoddard* was to operate as a discharge under certain circumstances only. It was conditional, provided the suit proceeded, and no defence was made, so that the wheat might be sold under the judgment. These terms were not fulfilled; for a defence was made to the suit.

2. As to the plea of infancy; one of the witnesses testified that the defendant promised after he was of age to pay his half of the note; and this promise was made for the express purpose of removing any doubts as to his liability.

3. It appears from the record, that both parties appeared to the suit, and it was defended. An appearance waives all objection of a want of notice or summons.

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THOMPSON, J., delivered the opinion of the court. It is a well settled rule, that a *release* to one of several *obligors, whether they are bound jointly, or jointly and severally, discharges the others, and may be pleaded in bar. (*Co. Litt.* 232. a. and note 144. 2 *Saund.* 48. a.) But where two are bound jointly and severally, and the obligee covenants with one of the obligors only, not to sue him, it does not amount to a release, but is a covenant only, and the obligee may still sue the other obligor. (8 *Term Rep.* 171.) The settlement made in the case before us, is somewhat in the nature of an agreement not to prosecute the elder *Stoddard*. But a technical *release under seal* is necessary to be given to one of several debtors, in order that the others may avail themselves of it as a discharge. In the case of *Fitch v. Sutton*, (5 *East*, 232.) Lord *Ellenborough* says, it cannot be pretended that a receipt for part only, though expressed to be in full of all demands, must have the same operation as a release. The same doctrine is fully recognized by this court in the case of *Harrison v. Close and Wilcox*, (2 *Johns. Rep.* 449.) in which it appeared, that the defendants having given the plaintiff a joint and several promissory note for 71 dollars, the plaintiff agreed with one of them, if he would pay him 21 dollars and 55 cents, he would not call on him for payment of the note, but would look to the other defendant for the residue. The 21 dollars and 55 cents were paid, but this was held not to be a satisfaction of the note, nor a bar to the plaintiff's action. These authorities are sufficient to show that the receipt given by the plaintiff forms no objection to the present action.

The appearance of the elder *Stoddard* to the suit commenced against him in *Vermont*, cured all irregularity, if any had been committed, in the commencement of the suit, on account of his not being within the state. The other questions, sug-

gested on the argument, were matters of fact submitted to the jury. The promise of the younger *Stoddard*, after he came of age, was sufficient to remove every objection on the ground of infancy, *if that promise applied to the note, which in the opinion of the jury it did. And to what amount payments had been made, was to be determined between the evidence of *Stewart*, on the part of the defendant, and the testimony furnished by the appraisement of the wheat attached in *Vermont*. The jury, by their verdict, have adopted the latter, which was, perhaps, the most correct; at all events, it was a proper subject for their determination.

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The motion for a new trial must, therefore, be denied.

HOLLIDAY against MARSHALL.

THIS was an action of covenant, tried at the *Washington* circuit, 13th *June*, 1810, before Mr. Justice *Van Ness*. The plaintiff declared on a lease, dated 6th *January*, 1792, by which the defendant demised to the plaintiff a lot of land, for the term of eight years from *November* 6, 1791. The lease contained the following covenant on the part of the defendant, to wit, "that the said *Roger Holliday*, his heirs, executors, administrators or assigns, have either a renewal of the lease, on such terms as should be agreed upon, or in case the land should be sold, that the said *Holliday*, his heirs, &c., should have the first offer thereof, or in case no agreement should be made for the demising or selling the lot of land, that then the buildings and improvements on *the lot should be valued by three or five indifferent persons, to be chosen by the parties, &c., and whatever should be deemed the value of the same, should be paid to the lessee, his heirs, &c., upon delivering up and removing from the premises," &c. The lease passed by assignment to several hands, and, before the expiration of the term, was assigned to the plaintiff. The several assignments were set out in the declaration. The plaintiff averred that the premises were not sold, nor was there a renewal of the lease, and that, at the expiration of the term, he surrendered up the premises to the defendant, and removed from the lot, and thereupon applied to the defendant to agree on the choice of three or five indifferent persons, to appraise the buildings and

The assign-
ment of a lease
by writing not
under seal, is
good.

Where, in a
lease for a term
of years, it was
covenanted be-
tween the lessor
and lessee, that
at the expira-
tion of the term,
the buildings
and improve-
ments should be
valued by three

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or five indiffer-
ent persons to
be chosen by
the parties, and
after the term
and surrender
of the premises,
the lessee ap-
plied to the les-
sor to agree on
three or five
persons to ap-
praise the build-
ings, &c., and
he refused to do
it, on which the
lessee had the
buildings, &c.
appraised by
three indifferent

men, who valued them at 780 dollars; it was held, in an action against the lessor, on his covenant, that the lessee was not entitled to receive interest on the 780 dollars, as the *ex parte* appraisement was not conclusive, and the damages remained unliquidated, to be ascertained by the verdict of the jury.

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improvements on the premises, which the defendant refused to do. The plaintiff thereupon applied to three indifferent persons for that purpose, who appraised the buildings and improvements at 750 dollars, of which notice was given to the defendant.

One of the assignments in the lease set forth in the declaration was from *Immanuel Deake* to *Benjamin Hawkins*, for the consideration of ten pounds.

The defendant pleaded, 1. That *Immanuel Deake* did not assign, &c., to *Benjamin Hawkins*; 2. That the plaintiff did not propose to the defendant to choose three or five indifferent persons to appraise the buildings and improvements, &c.

At the trial, the defendant objected to the reading the assignment from *Deake* to *Hawkins*, as it was not under seal, and the plaintiff was bound to prove an assignment by deed; but the judge overruled the objection, and the assignment was read in evidence. The plaintiff then proved that he applied to the defendant to join in the appointment of three or five indifferent persons to appraise the buildings and improvements left on the premises, which the defendant refused to do. The plaintiff then proved the value of the buildings and improvements to be 750 dollars; and claimed interest on that sum from the time the defendant had notice of the appraisement, which was objected to, and a verdict was taken for the plaintiff, subject to the opinion of the court, on a case to be made

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The cause was submitted to the court without argument.

Per Curiam. 1. The assignment of the lease is good without being under seal. This is obvious from the language of the statute of frauds, which declares an assignment not good, unless it be by deed or *note in writing*; and such was the decision of the K. B. in the case of *Fry v. Phillips*, (5 Burr 2832.)

2. The plaintiff is not entitled to interest on the 750 dollars. The value of the improvements or amount of damages was uncertain and unliquidated. Although the covenant provided for an appraisement of the improvements, in case the land was not sold to the plaintiff; yet the defendant was not a party to the appraisement. He refused to unite in it, and there is nothing in the covenant making an *ex parte* appraisement binding on the defendant. The value of the improvements was open to inquiry, at the trial; the plaintiff's claim is, therefore, to be considered as resting in unliquidated damages, upon which interest is not recoverable. He must, accordingly, have judgment for the 750 dollars only.

Judgment for plaintiff accordingly.

NEW-YORK,
Nov. 1810.JACKSON
v.
JACKSON.***JACKSON, ex dem. ELMENDORF and others, against
JACKSON and others.**

THIS was an action of *ejectment*, for land in the *Hardenbergh* patent, in the county of *Ulster*.

A patent was issued the 23d *April*, 1708, to *Johannis Hardenbergh* and others. *Leonard Lewis*, one of the patentees, died seised of one equal and undivided *eighth* part of the lands patented, in 1720, having, by his will, dated the 27th *February*, 1723, devised the premises to his wife, for life, with remainder in fee to his eleven children named in the will. The eldest son was named *Thomas*, and another was named *Leonard*. On the 4th *May*, 1742, the widow released to her children all her interest in the estate of her husband. On the 15th *November*, 1749, a partition was made of the *Hardenbergh* patent, and the proprietors of the other *seven* parts released to the children of *Leonard Lewis*, deceased, certain lots, equal to one *eighth* of the whole. On the 17th *November*, 1749, a subdivision was made among the eleven devisees of *Lewis*, by which the premises in question became the separate estate of the testator's son *Leonard*. These partitions were confirmed by an act of the legislature, passed the 29th *March*, 1790.

Leonard, the son of the patentee, was born in the county of *Dutchess*, and went to reside in *St. John's*, in the island of *St. Thomas*, a *Danish* island, where he married a *Danish* subject, by whom he had issue two daughters, named *Gersie Maria*, and *Anne Elizabeth*. He died there, in the autumn of the year 1750. *Gersie Maria* married a *Danish* subject, but died in 1767, without issue, and before she was of a full age. *Anne Elizabeth* married *Hans Petrie Bey*, a *Danish* subject, of *St. Thomas*, by whom she had a daughter, born in *1773 or 1774. She died in 1774, soon after the birth of her daughter, who also died in 1774 or 1775.

Thomas, the heir at law of the patentee, died in 1766, and his eldest son died in his life-time, leaving a son named *Thomas*, who, on the 9th *March*, 1789, made a will, and died in *August*, 1789, leaving five children, lessors of the plaintiff. His executors, on the 9th *May*, 1792, as acting under a power contained in the will, conveyed, by deed, the premises in question to *Lucas Elmendorf*, one of the lessors.

It was admitted that the premises are part of a large tract

Where there is a failure of inheritable blood, by reason of *alienism*, the lands do not *escheat*, but go to the next heir. *L.*, a native of *New-York*, was seised of lands in 1749. He afterwards went to *St. Thomas*, a *Danish* island, married a *Danish* subject, by whom he had two daughters, and died in 1750; one of the daughters died, without issue, and before coming of age; the other daughter married a *Danish* subject, and died in 1774, leaving an infant daughter, who died in 1775. It was held, that the two daughters were natural born subjects of *Great Britain* within the stat.

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of 3 *Geo. II. c.* 21. but that the granddaughter was an *alien*; and that the lands of *L.* did not *escheat*, by reason of the *alienism* of the granddaughter; but that the issue of the elder brother of *L.* would inherit, as the next heir at law. (a.)

(a) Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs at law, but the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence. *Orr v. Hodgson*, 4 *Wheat.* 453. *Vid. Suttiff v. Forgey*, 1 *Coven*, 89.

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of wild and uncultivated land, and that the defendants have recently taken possession.

The defendants contended, that by the death of *Anne Elizabeth*, daughter of *Leonard*, in 1774, the estate *escheated*.

The case was submitted to the court without argument.

KENT, Ch. J., delivered the opinion of the court. The lessors of the plaintiff claim title under *Thomas Lewis*, on the ground that the inheritable blood in the line of lineal descent of *Leonard Lewis*, a younger brother of *Thomas*, and who died seised of the premises, failed, because his granddaughter was an alien. *Leonard Lewis the younger* was seised of the premises in 1749, and before he went to the *West Indies*. He married a *Danish* subject in the island of *St. Thomas*, and died there, leaving no issue but two daughters, one of whom died without issue, and the survivor, who was born in *St. Thomas*, married an alien, and died, leaving a daughter, an infant and alien, and who died also without issue. The two daughters were natural-born subjects within the statute of 3 Geo. II. c. 21. because their father was a subject, but the granddaughter was clearly an alien.

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If the land did not escheat in consequence of the *alienism of the infant heir, but went to the next collateral heir, who was not an alien, then it is certain that the land went to *Thomas Lewis* and his representatives, he being the elder brother of *Leonard*, whose inheritable blood had thus failed.

The only question in this case, then, is, whether *Thomas* or his issue could inherit, when the lineal descendant of his younger brother was an *alien*, and so could not inherit. There is a *dictum* of *Newton, J.*, in 22 Hen. VI. 38. pl. 5. that he could not, and that *dictum* appears to have been acquiesced in by the counsel. The instance given by *Newton* to illustrate his position is correct, but the application fails. He says, that if one be attainted of felony in the life-time of his father, and survives his father, the land shall escheat, notwithstanding the father left other issue or a brother living. The same doctrine is advanced in a number of later authorities. (*Co. Litt.* 163. b. *Hob.* 334. *Cro. Car.* 435. *Dyer*, 48. a. *Hawk.* b. 2. c. 49. s. 50.) But there is a distinction between the failure of inheritable blood, by reason of alienism, and by means of attainder; and the next heir will take in the first instance, but not in the other. This distinction is to be found in *Coke*; (*Co. Litt.* 8. a.) but it is stated in the clearest manner, in the treatise on the *Law of Forfeiture*, ascribed to the son of Lord *Hardwicke*. (a) He says, (p. 72.) that, by the ancient common law of *England*, "where a man was not capable of civil rights by nature, as an alien born, and never naturalized, being un-

(a) The honorable *Charles Yorke*.

known to the law, he was excluded from inheriting; and the next of kin within the allegiance, who did not claim under him, was admitted; or where he had incurred civil disabilities, by his own voluntary act, not criminal, as one who entered into religion, or abjured the realm, he was taken to have undergone a civil death, and the next in course of descent entered. But where he is attainted of treason or felony, the law will not pass him over, and marks him out *in rei exemplum et infamiam*. *Hence it is, that, though he was never in possession, nor those who claim under him more capable of inheriting than he, by reason of the consequential disability arising from the attainder of the ancestor, yet the estate will be interrupted in its course to the collateral and escheat." Though this rule is well established in the case of attainder for crimes, yet even there it is condemned by *Craig*, in his *Law of Feuds*, who says, that the estate ought to go to the next collateral branch, instead of escheating, since it is not necessary for the collateral to make title through the criminal, but he may have his descent from an innocent and common ancestor. Lord Ch. *Yorke*, however, ably vindicates the *escheat*, in the case of attainder, on the ground of public polity. We have, at present, nothing to do with this question; and it is sufficient to say, that the doctrine of *escheat* does not apply to the present case; and judgment ought to be rendered for the plaintiff.

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Judgment for the plaintiff.

JACKSON, *ex dem.* ROGERS and GARDINIER, *against*
CLARK and another.

THIS was an action of ejectment, and was tried at the *Saratoga* circuit, in 1810, before Mr. Justice *Van Ness*.

*The plaintiff claimed title to lot No. 1, of the subdivision of lot No. 3, in the division of great lot No. 10, in the 21st allotment of the patent of *Kayaderosseras*, containing 155 acres, situate in the town of *Providence*, in the county of *Saratoga*.

At the trial, the plaintiff produced a mortgage in fee, from *William Clark* to *Rogers*, one of the lessors, dated the 4th *September*, 1797, to secure the payment of 50 dollars, on or before the 1st *September*, 1801. The mortgaged premises were described as being known and distinguished by "lot No. 1, of the smaller lots into which lot No. 3, of the subdivision of lot No. 10, in the 12th general allotment of the patent of *Kayaderosseras* is subdivided, beginning at a hem-

If, in the description of an estate in a deed

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there are particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances false or mistaken will not frustrate the deed. But where the description of the estate intended

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to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree with every particular of the description. (a)

Where the description of the premises in a deed were, all, &c. "lot No. 1, of the smaller lots into which lot No. 3, of the subdivision of lot No. 10,

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in the 12th general allotment of the patent K., &c." and there was a mistake in inserting the 12th instead of 21st general allotment, it was held, that the premises which were claimed to be in the 21st general allotment,

passed by the deed; and if the words "with the dwelling-house thereon," be inserted in the description, when, in fact, there was no dwelling-house on the premises claimed under the deed, it is merely a false circumstance, which does not control the rest of the description, nor defeat the grant.

The notice of a sale of mortgaged premises, pursuant to a power under the statute, may be postponed to a further day, provided notice of such postponement be also inserted in the gazette, and put up on the court-house door; and it seems, it is not necessary to give a further notice of six months, of a postponement.

But where a notice of a sale was given in February, to take place on the 12th August following, which was duly published, &c., and in June a notice was inserted in the gazette, that the sale was postponed to the 3d of September, which notice of the postponement was not put up at the court-house door, and the sale took place on the 12th August, pursuant to the original notice; it was held, that the sale was irregular and void.

(a) Acc. *Jackson v. Root*, 18 Johns. R. 60. *Jackson v. Loomis*, Id. 81. S. C. in error, 19 Johns. R. 449. *Lush v. Druse*, 4 Wendell, 313. *Erwin v. Moore*, 6 Cowen, 706. *Doe v. Roe*, 1 Wendell, 541. *Jackson v. Marsh*, 6 Cowen, 231. *Doe v. Thompson*, 5 Cowen, 371. *Butterfield v. Cooper*, 6 Cowen, 431.

lock tree, marked No. 2 and 3, being the north-west corner of lot No. 2, of the said subdivision, and standing on the easterly bound of lot No. 9, of the said allotment," &c., giving the other courses and distances, mentioning "a stake and heap of stones," the south-west corner of lot No. 4, of the smaller lots, as a monument, and "a stake and heap of stones, being the north-west corner of lot No. 2, of the said smaller lots," as another monument or boundary, containing 155 acres, with a dwelling-house thereon.

The mortgage contained the usual power of sale, and was duly acknowledged and registered. The sale of the mortgaged premises, under the power, was advertised in the *Albany Gazette*, for six months, which expired the 7th August, 1806. The advertisement was dated the 17th February, 1806. A postponement was made of the time of sale; and the following notice was subjoined and continued with the advertisement until the 7th August, 1806, when both were discontinued. "Note, the sale of the above property is postponed to Wednesday, the 3d September next. June 16, 1806. James Rogers." A sale was made of the premises, pursuant to the advertisement and notice, on the 12th August, and Gardinier, the other lessor, became the purchaser. The first advertisement was regularly put up at the court-house door of the county, during six months, but the notice of the postponement and continuance were not affixed there.

The plaintiff gave in evidence a deed from the mortgagee to Gardinier, the other lessor, dated the 16th January, 1809, for the consideration of 103 dollars, which recited the mortgage, advertisement and sale.

A witness testified, that the boundaries expressed in the mortgage comprehended the lot No. 1, but that the 12th allotment of *Kayaderosseras* patent lies in the county of *Montgomery*, and that there were no buildings on the premises in 1797. The scrivener who drew the deed testified, that he inserted the words "with the dwelling thereon," without knowing whether there was a house on the premises or not. The defendants were proved to be in the possession of the

premises. The counsel for the defendants moved for a nonsuit, on the ground that the directions of the act concerning mortgages had not been pursued in the advertisement and sale of the premises; but the motion was overruled.

The defendants proved, that on the 29th *April*, 1797, the premises in question were conveyed in fee, by *Jonathan Hagedun* to *Rogers*, the lessor, and that *Rogers*, on the 4th *September*, 1797, conveyed the premises in fee to *William Clark*, who died intestate, about the 1st *March*, 1798. Administration was granted by the surrogate of *Saratoga*, on the estate of *Clark* to *John Taylor*; and on the 13th *October*, 1800, an order was made by the surrogate for the sale of all the real estate of *Clark* in the county of *Saratoga*; and a deed from the administrator to *Nathan Harman*, on a sale pursuant to this order, dated the 6th *December*, 1800, was produced. *Harman* conveyed the premises by deed, dated 1st *February*, 1801, to *Elijah Olmstead*, who, on the 1st *April*, 1802, conveyed them to *John Taylor*, who, on the 19th *October*, 1805, conveyed the same premises to the defendants.

A witness testified that there was a lot No. 10, in the 12th allotment of *Kayaderoseras* patent, containing 100 acres, but that it had never been subdivided.

Payment of the mortgage to *Rogers* had been demanded of the administrator of *Clark*, (without showing the mortgage,) previous to the advertisement and sale; but the administrator refused payment, alleging that the mortgage did not cover the premises in question.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts, with liberty to either party to turn the same into a special verdict.

Van Vechten, for the plaintiff. The plaintiff may claim either under the mortgagee, or under the purchaser at the sale made by virtue of the power contained in the mortgage. The defendants claim to hold under the mortgagor. The premises are described as in the 12th allotment, but in fact are in the 21st allotment. It is a cardinal rule in the construction of deeds, that they are to be so construed, if possible, that the deed may take effect, according to the intent of the parties. If the designation of the allotment is incompatible with the rest of the description, it ought to be rejected, when there is sufficient to ascertain the land intended to be conveyed. There was a lot No. 10, in the 12th allotment, but it never had been subdivided, so that it could not comprise a lot No. 1, in lot No. 3, of the subdivision of lot No. 10. The description by courses and bounds is clear and precise; and there are fixed monuments, as stakes and heaps of stones, to mark the situation. It is proved that there was not, in fact, any house on the premises intended to be conveyed; and the mortgage

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was executed on the same day the premises were conveyed *to the mortgagor. Shall he or the persons claiming under him be allowed to make such an objection?

The rule on this subject is well laid down in the case of *Worthington and others v. Hylyer and others*, (4 *Tyng's Mass. Rep.* 196.) in the Supreme Court of *Massachusetts*, which is very analogous to the present case. The court said, "If the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the description, yet it shall pass by the conveyance, that the intent of the parties may be effected." Here lot No. 1, in lot No. 3, of the subdivision of lot No. 10, corresponding with the courses, and distances, and fixed monuments, are sufficiently certain, though the number of the allotment is wrong.

Any trifling inaccuracy in the description of the premises will not invalidate the notice. There would have been no mistake in this case as to the sale. The administrator had notice of the mortgage, for it was recorded; and it was proved that actual notice of the mortgage was given to him.

Taylor, contra. The description of the estate should be so certain, that by the terms of it the premises may be designated. The situation of the premises is material. Here no *town* or *county* is mentioned, which would be decisive of the situation. The number of the allotment, then, is the controlling circumstance in this description. There may be lots of the same numbers, containing the same quantity of acres, with similar courses and distances in the 12th and 21st allotments.

There is no ambiguity on the face of the deed, and it is not to be explained by parol evidence. (2 *W. Bl. Rep.* 1249. *Gilb. Law of Ev.* 312.) If a man grant his manor of *Dale* in *Dale*, and part of the manor extends into *Sale*, no part lying in *Sale* will pass by the deed. (*Shep. Touch.* 98, 99.) Neither the number of acres nor the boundaries, or courses and distances, form a controlling circumstance. *If a man grant all his land in *A.*, all the land in *A.* will pass, be it more or less, and however incorrectly the boundaries may be stated.

If the premises are to be considered in the 21st allotment, the description of them in the mortgage will not be notice to a purchaser who examines the record. A purchaser would look to the number of the lot, and the allotment, not to the particular bounds or courses and distances. But what evidence is there that the premises were in the 21st allotment? Mere similarity of description does not make it the same; nor is it made out by the correspondence of the date with that of the deed from *Rogers*.

Again, a dwelling-house is mentioned as parcel of the premises; and it is proved that there was no dwelling-house on the premises until 1805. The description in the deed from *Rogers*

does not correspond exactly with the description in the mortgage. A description should be so far exact, as that, according to the literal meaning of the terms, the premises in question may be included.

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Again, the action of ejectment is to try the title of the lessor of the plaintiff; and if demises are laid from several lessors, and the titles of the several lessors are incompatible with each other, the plaintiff ought to be held to the title relied on at the trial. The plaintiff relied on the demise of *Gardinier*; and if a title is shown in him, there can be none in *Rogers*; for the two are irreconcilable with each other. Having expressly claimed to recover on the demise of *Gardinier*, the plaintiff is excluded from setting up a claim under the demise of *Rogers*.

Again, the deed from *Rogers* recited the mortgage, advertisement and sale; he is, therefore, bound by that recital, and cannot allege that the title was different. (1 *Salk.* 286.)

Then, as to the claim under *Gardinier*. The plaintiff has not shown sufficient to entitle him to a recovery on this demise. There was no notice of the time of the actual sale put up at the door of the court-house in the county, as is required by the statute. The only notice put up was of a sale to take place on the 12th *August*. Besides, six months' notice of the actual sale was not published in the gazette. In *June*, the sale was put off from the 12th *August* to the 3d *September*; and there should have been a new notice. The first given in *February*, of a sale in *August*, expired the 7th *August*, and was not continued afterwards; and the sale was actually made the 12th *August*, after the entire discontinuance of the original advertisement and notice.

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Again, it does not appear that the power to sell was recorded, pursuant to the statute, before the sale was made, and the conveyance executed.

The postponement of the sale was also made without the consent of the defendant, and did not specify the place or hour of sale. I contend that where a sale is postponed, there must be six months' notice of such postponement.

SPENCER, J., delivered the opinion of the court. The rules which govern the construction of grants have been settled with the greatest wisdom and accuracy. The following principles will govern the construction of this deed. Such construction is to be given as will give effect to the intention of the parties, if the words they employ will admit of it; *ut res magis valeat quam pereat*. If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant; as in *Blague v. Gould*, (Cro. Car. 447. 478.) There was a devise of a house; called the corner house

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in *Andover*, in the tenure of *B.* and *H.*, whereas it was in the tenure of *B.* and *N.*, the deviser having a house thereto near adjoining in the tenure of *H.*, and it was held, that the corner house in the tenure of *B.* and *N.* passed, for that the devise sufficiently ascertained *the thing, by the words "corner house;" and the addition of the tenure was surplusage. But when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every description. (4 *Tyng's Mass. Rep.* 205. 3 *Atk.* 9. *Dyer*, 50.) Thus, if a man grant all his estate in his own occupation in the town of *W.*, no estate can pass except what is in his own occupation, and is also situate in that town.

Testing the present case by these rules, the deed is operative, and will pass the lot in question, though it does not lie in the twelfth general allotment of the patent; the description of the premises by lot No. 1 of the smaller lots into which lot No. 3, of the subdivision of lot No. 10, had been divided, sufficiently designates the lot intended to be granted, and the addition of the general allotment, which is unquestionably the addition of a false or mistaken circumstance, cannot vitiate what was before certain, and frustrate the grant. In addition to the certainty already mentioned, the courses and distances of the lot for which the plaintiff sues, precisely correspond with those given by the deed, and a hemlock tree marked 2 and 3, and recognized in the deed as the north-west corner of lot No. 2, and as standing in the easterly bounds of lot No. 9 of the said allotment, is in fact thus situated; and also two monuments of stakes and stones, and the quantity given by the deed, are all found to concur with respect to the lot in question. It appears from the evidence, that there was a lot No. 10 in the twelfth allotment of the *Kayaderosceras* patent, but that it never had been subdivided, and consequently it cannot be that the lot in question lies in that general allotment. It does not appear, and however the fact may be, we cannot travel out of the case, that there is any other general allotment which has been subdivided in such manner as to correspond with the description in *the deed, in all but the general allotment. The insertion of the words, "with a dwelling-house thereon," appears also to have been a mistake of the scrivener; but admitting that parol evidence could not be received to show the mistake, it was, at most, a false circumstance, and cannot control the other description in the deed.

As to the other point, I can perceive no objection to the postponement of a sale under a mortgage, on the day and at the place of sale, provided there is the same notice given which the act requires in the first instance; I mean with respect to the publication in the paper, and the notice on the door of the

court-house. 'The six months' notice is not solely for the purpose of giving notoriety as to the time and place of sale; it was intended to give the mortgagor, in addition to that, an opportunity to raise the money. In analogy to the constant practice of sheriffs' postponing sales, without giving the six weeks' notice at first required, and which has not been questioned, I should say that a postponement, with the restrictions I have mentioned, might be made.

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But in this case it is admitted that the sale was made on the 12th of *August*, 1806, the day first appointed in the notice. On the 16th of *June*, 1806, a postponement underneath the original notice was begun to be published in the newspaper, and continued until the 7th of *August*, after which both were omitted.

The postponement was in these words: "Note, the sale of the above property is postponed to *Wednesday*, the 3d day of *September* next. *James Rogers*." Of this postponement, no notice was given on the door of the court-house, and it was so far disregarded, that the sale took place according to the original notice. Whether there could be a postponement before the day of sale, unless upon a six months' notice, as the act directs, is one question; but it is a different question, *whether, after a public notice of a postponement by the mortgagee, he could proceed to sell at the time first appointed, disregarding wholly the postponement. If this was a sale by a sheriff, the law would protect the purchaser, and hold the sale valid; but in case of an insufficient notice, it would punish the officer. In this case, the regularity of the sale is to be made out as a part of the purchaser's title, and if irregular, he takes nothing by his deed. In my opinion, the sale is irregular and void; the mortgagee, after publicly postponing the sale, which was a thing wholly under his control,^(a) was bound by it, and could not so far disregard it, as to proceed on the original notice. If the contrary position should be upheld, it would enable mortgagees to commit frauds, by selling, after they had, by their own acts, lulled the mortgagor into security.

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For these reasons, I am of opinion, 1. that the premises did pass by the mortgage; and, 2. that the sale under it is not valid.

Judgment for the plaintiff.

(a) A foreclosure of a mortgage by virtue of a power of sale under the statute, is not founded upon any judgment or decree of a court, but is the act merely of the mortgagee. *Jackson v. Dominick*, 14 Johns. R. 435.

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Where a lease for life contained a covenant that the lessee should not sell or assign without the permission of the lessor, and the lessee did sell and assign a part of the premises, with the consent of the lessor, it was held, that this did not amount to a surrender, but the lessee still remained liable to every act of his assignee amounting to a breach of the covenants contained in the lease.

Where wood is cut down on leased land, by the lessee or his assigns, in such a manner as materially to injure the inheritance, it is waste, and the lessee is liable to

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an action for the breach of the covenant against waste; and where the lease contained a clause of re-entry for a breach of the covenants and conditions in the lease, it was held that the lessor might maintain ejectment. (a)

Where wild and uncultivated land, wholly covered with wood and timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste; but he cannot cut down *all* the wood and timber, so as permanently to injure the inheritance.

And to what extent the wood and timber, on such land, may be cut down, without waste, is a question of fact for a jury to decide, under the direction of the court.

THIS was an action of ejectment for a farm in *Whitestown*. The cause was tried at the *Oneida* circuit, the 5th June, 1809, before Mr. Justice *Yates*.

At the trial, the plaintiff gave in evidence the counterpart of a lease, dated the 3d September, 1790, from *Philip Schuyler*, of *Albany*, to the defendant, for the premises in question, for the lives of the defendant, his wife, and *Samuel Shaw*, respectively. The farm contained 133 acres and a half. The lease contained various covenants, reservations and conditions, among which was the following: And the lessee "doth also covenant, promise and agree, that whenever he shall be inclined, or be by law or otherwise, obliged to sell, assign, &c. his interest in the premises, &c., then in that case he shall make the first offer to the lessor, &c., notifying and declaring in writing what he will take for the same; and if the lessor, his, &c., do not take it at the price required, &c., that then he, the lessor, shall, within 21 days after such notice, &c., and on the further application of the lessee, &c., grant a permit to him to sell, assign, &c. Provided always, that every sale, &c., of any part or parcel of the said premises shall be void, &c., and the premises revert to the lessor, &c., unless the seller or purchaser shall, before such sale, pay the rent in arrear," &c. "And it is further conditioned on the part of the said lessee, that neither the said lessee, his executors, &c., shall or do at any time hereafter, erect or permit, or cause to be erected, any mill or mill-dam, or any *other work or building whatsoever, upon any kill, creek, stream, or run of water, within the premises, &c.; and further, that neither he nor they shall, at any time hereafter, commit any waste."

"And in case the said lessee, his, &c., shall not perform, fulfil, abide by, and keep all and every of the covenants and conditions herein covenanted and conditioned, &c., then in each of the said cases, it shall thenceforth be lawful for the lessor, his, &c., into the whole of the said premises, or into any part thereof, in the name of the whole, to reënter, and

(a) An action on the case, in the nature of waste, may be maintained against the assignee of a lessee. *Short v. Wilson*, 13 Johns. R. 33.

the same to have again, repossess and enjoy, as his or their former estate," &c.

The lessors were the heirs of *Philip Schuyler*; this action was brought to recover the possession of the south half of the premises, on the ground of forfeiture by a breach of the covenant; the lessee or his assigns having committed waste thereon by clearing and draining off the land more than a reasonable and due proportion of the wood. It was admitted that, at the date of the lease, the premises were wild and uncultivated, and covered throughout with a forest of heavy timber.

The plaintiff proved that the defendant occupied the south half of the premises, which were entirely cleared of wood, before the commencement of the suit; and that on the north half occupied by *Shaw*, the whole was cleared except about six or eight acres, on which more than half the wood and timber had been cut down and removed, before the commencement of the suit.

It was also proved, that a permanent supply of fuel, timber for buildings, and wood for fences, for the use of the demised premises, would require that, at least, thirty acres should have been preserved in wood.

The defendant gave in evidence a written permission endorsed on the lease, dated 4th *July*, 1796, by which the lessor consented that the lessee should assign it to *Samuel Shaw*; and an assignment by the lessee of the north half of the farm to *Shaw*, subject to all the covenants, &c. contained *in the lease. The defendant also produced several receipts from the lessor and his agent for rent, received of the defendant and *Shaw*, from 1st *February*, 1799, to *May* 1, 1805. It was also proved, that about 12 years since, there were 35 acres of land covered with wood and timber on the premises, and about 12 acres of woodland, on that part in the possession of the defendant, only half of which was good for timber, except for fences, the residue was principally *hemlock*, and much injured by violent winds; that the defendant had cut no wood or timber on the part in his possession, except for fuel, fences, and building for the use of the farm, and which had been gradually cut, since the assignment; that since the assignment to *Shaw*, the defendant had built a house on the premises, which was completed about four years since; and had used the farm in a husbandlike manner, and had carried on more materials for fences than he had taken off; that at the time of the assignment to *Shaw*, and for many years after, cleared land was of much greater value than land covered with wood and timber; and that good farms in the vicinity of the premises had not reserved more than 12 acres of woodland out of 100 acres. The lessor had an agent to collect his rents residing at *Whites-town*, about four miles from the premises; but it appears that

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the agent never saw the premises, nor knew the situation of them.

The judge was of opinion, that the permission of the lessor to the lessee to assign part of the demised premises, and the subsequent recognition of the defendant and *Shaw* as separate tenants, operated as a severance of the original lease; and that the gradual clearing of that part in possession of the defendant, since the assignment, did not, in law, amount to waste; and he directed the jury to find a verdict for the defendant; and the jury found accordingly.

A motion was made to set aside the verdict and for a new trial, for the misdirection of the judge.

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Platt, for the plaintiff. The waste in this case consisted in cutting down all the wood and timber. If a tenant for *years, or for life, &c., does a permanent injury to the freehold or inheritance, it is waste. (*Co. Litt.* 52. b. 53. a.) Timber is a part of the inheritance, (2 *Mod.* 94.) and oak, ash and elm are timber in all places; and in some places, where these are not found, other trees used for building are timber. The definition of waste by the *English* law is taken strictly. To convert wood, meadow or pasture into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste. (*Hob.* 296. 2 *Black. Comm.* 281, 282. *Co. Litt.* 53. a. b.) There is no reason why the *English* rule should not be strictly applied to lands under cultivation in this country; though in regard to *wild* lands it ought not to be carried to the same extent; but even in regard to them, a tenant can never be allowed to cut off *all* the wood and timber. We do not ask the court to apply the common law rule strictly, but only for such a reasonable application as may prevent a permanent injury to the inheritance. What degree of destruction shall amount to a permanent injury to the heir or reversioner, may be safely left to the decision of a jury of the vicinage.

If, then, the defendant has committed *waste*, and thereby incurred a forfeiture of his lease, has the lessor, by any act, waived that forfeiture? Courts may lean against forfeitures, where they would press hard upon a lessee. In *Jackson*, ex dem. *Colden and others, v. Brownell*, (1 *Johns. Rep.* 267.) the court did not seem inclined, where the covenant was explicit and unequivocal, and clearly broken, to seek, by any latitude of construction, to prevent a forfeiture of the lease. It was as much for the interest of the lessee, in the present case, as of the lessor, to preserve sufficient wood and timber for the use of the farm; but he has cut off every tree, without leaving any wood for fuel, or for building and repairs.

The underletting by the lessee, with the consent of the lessor, was no severance of the lease. Where there is an express covenant, an acceptance of rent from a sub-tenant does
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not discharge the lessee. The lessee remains liable for all acts done by his sub-lessee. But the defendant, since the assignment, on the strictest construction, has committed *waste on the land in his possession. There were 12 acres of wood and timber on that part of the farm at the time of the assignment of the other part to *Shaw*, and at the commencement of the suit the whole had been cut down.

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Kirkland, contra. According to the doctrine of the common law of *England*, the defendant could not have cut down a single tree, without committing waste. But such a rule could never have been contemplated by the parties. It would have defeated the purpose of the lease; for the tenant could never have enjoyed the premises without cutting down trees and clearing the land, so as to render it fit for cultivation. In providing against waste, it never was intended to prevent the clearing of the land. The lessor, if he wished to preserve the trees, or any part of the wood, should have provided in the lease, that only a certain number of acres should be cleared. In determining what acts of the tenant amount to *waste*, the court will take into consideration the state of the country, and the situation of the lands. Even in *England*, regard is shown to the state of lands in different counties; so that what would be waste in cutting one species of timber in one county, would not be waste in cutting the same kind of trees in another county. (*Co. Litt.* 53. b. *Bac. Abr.* Waste, C. *Comyn, Waste*, D. 5. 2 P. *Wms.* 606. *Cruise's Dig.* tit. 3. s. 18, 19.) In this country there are obvious and very powerful reasons to induce the court to adopt a far more liberal construction of the term *waste*, in regard to wood and timber, than that afforded by the *English* law.

Then, as to the alleged forfeiture. At the time of the assignment of the north half to *Shaw*, there were about 20 acres of woodland to the 100; and the defendant cannot be liable for the acts of *Shaw*, after he was accepted as a tenant by the plaintiff, and paid him rent. The assignment, by permission of the lessor, amounts to a surrender by the lessee, and the acceptance of rent from the new tenant discharges the first lessee. (a) After a surrender of the term, an action of *waste* will not lie against the tenant. (*Com. Dig. Waste*, E. 4.)

*Again, since the alleged forfeiture, the lessor has received rent, which amounts to a waiver of the forfeiture; and the defendant has built a house, and laid out his money in improvements. (*Cowp.* 482. 3 *Co. Rep.* 64. b. 2 *Term Rep.* 430, 431. 1 *Saund.* 287. b. n. 16.) Where there is a clause of reentry, for non-payment of rent, the lease is only voidable, and the acceptance of rent is an affirmation of the lease.

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(a) *Sparrow v. Hawkes*, 2 *Esp. Cas.* 505. But this was not the case of a lease.

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VAN NESS, J. The covenant restraining the lessee from alienating, without previously obtaining the permission of the lessor, is for the benefit of the latter. Its object was to secure to the lessor the right of preëmption, and to prevent a bad tenant from being obtruded upon him. If the lessor had sold without such permission, a forfeiture of the estate would have been incurred. To effect a valid assignment, therefore, the consent of the lessor was requisite, and that in this case having been obtained, the assignment was legal, and all parties stand in the same relative situation to each other as they would have done after assignment, if the lease had contained no such covenant. The lessee covenants for himself, his heirs and assigns, and he is therefore liable for every act of his assignee, amounting to a breach of any of the covenants or conditions in the lease. To this point the cases are numerous and decisive. (*Brett v. Cumberland, Cro. Jac.* 521. *Bachelor v. Gage, Cro. Car.* 168. *Norton v. Ackland, Cro. Car.* 580.)

But it is said, here has not been *waste*. It is a general principle, that the law considers every thing to be waste which does a permanent injury to the inheritance. (*Co. Litt.* 53, 54. 1 *Cr. Dig.* 65. 6 *Com. Dig.* tit. *Waste*.) Now, to say that cutting down the wood on almost every acre of the demised premises is not *waste*, within the spirit and meaning of the covenant in the case, is to say that no waste, by the destruction of wood, can be committed at all. We are bound to give effect to this covenant if we can, but *to decide that the facts stated in the case do not constitute waste, would be destroying it almost altogether. That the destruction of the timber is a lasting injury to the reversion cannot be disputed. For this injury the lessors of the plaintiff may, at their election, bring covenant, or enter as for condition broken. For the breach of every covenant there is, by the express terms of the lease, a forfeiture of the estate, so that, whenever an act has been done which gives the right to maintain covenant, at the same moment the right to enter, as for a forfeiture, is equally given. It follows, that if this action cannot be sustained, the lessors of the plaintiff are totally remediless. It is true, that what would in *England* be waste, is not always so here. The covenant must be construed with reference to the state of the property at the time of the demise. The lessee undoubtedly had a right to sell part of the timber, so as to fit the land for cultivation; but it does not follow that he may, with impunity, destroy *all* the timber, and thereby essentially and permanently diminish the value of the inheritance. Good sense and sound policy, as well as the rules of good husbandry, require that the lessee should preserve so much of the timber as is indispensably necessary to keep the fences and other erections upon the farm in proper repair. The counsel for the defendant is mistaken when he says that lessees in *England* are pro-

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nibited from cutting wood upon the demised premises altogether; the prohibition, in principle, extends no further, in this respect, there than it does here. In *England*, that species of wood which is denominated *timber* shall not be cut down, because felling it is considered as an injury done to the inheritance; and therefore *waste*. Here, from the different state of many parts of our country, *timber* may, and must be cut down to a certain extent, but not so as to cause an irreparable injury to the reversioner. To what extent wood may be cut before the tenant is guilty of waste, must be left to the sound discretion of a jury, under the direction of the court, as in other cases. *What kind of wood in *England* is deemed to be timber, depends upon the custom of the country. Wood which in some counties is called timber, is not so in others. (*Duke of Chandos v. Talbot*, 2 P. Wms. 606. *Countess of Cumberland's case*, *Moore's Rep.* 812. *Co. Litt.* 536. *Cook v. Cook*, *Cro. Car.* 531. *Cro. Jac.* 126. n.) So a lessee for years is entitled to reasonable *estovers*; but he is guilty of *waste*, if he cuts green trees when there is *dry wood* (*aridum lignum*) sufficient. So again, if there be a tenant for life without impeachment of waste, he may cut down all sorts of timber, and convert them to his own use; but if he wantonly cuts timber which serves for ornament, or shelter, or which is not fit to be felled, he is punishable for waste. (1 *Cr. Dig.* 80.) The principle upon which all these cases were decided is that which I have before stated, namely, that whenever wood has been cut in such a manner as materially to prejudice the inheritance, it is waste; and that is the principle upon which I place the decision of this cause.

It may be supposed that this construction of the covenant in question proceeds upon equitable considerations, and that equity never favors any construction that leads to the forfeiture of an estate. On the contrary, the construction which I have adopted is the legal one, because I hold, that by destroying nearly *all* the wood on the demised premises, so that the land must soon be reduced to a mere common, and the buildings go to destruction for want of timber to keep them in repair, (unless it can be elsewhere obtained,) is such an injury to the inheritance, as, according to the established rules of law, amounts to *waste*. For my part, therefore, I lay all equitable considerations out of view, and proceed upon strictly legal grounds.

That the lessors of the plaintiffs, or their ancestors, had waived the forfeiture by the acceptance of rent, was not the ground upon which the judge directed the jury; and probably the attention of neither of the parties was directed to this point at the trial, though it is now insisted upon. As the case at present stands, there has been no waiver. It does *not appear that the lessors, or their ancestor, knew that a forfeiture

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had been incurred, and the acceptance of rent, unless they did at the time know this fact, is no waiver. (*Roe, ex dem. Gregson, v. Harrison, 2 Term Rep. 425. Matthews v. Whetton, Cro. Car. 233.*) On this part of the case, further light may, perhaps, be thrown on a future trial.

My opinion, therefore, is, that the motion for setting aside the nonsuit, and granting a new trial, ought to be granted.

KENT, Ch. J., and THOMPSON, J., were of the same opinion.

SPENCER, J. It is an established principle, that, in construing a covenant which is to work a forfeiture, courts adhere strictly to the precise words of the condition, in order to prevent the forfeiture. This rule, for its equity and reasonableness, deserves constantly to be kept in view. It is, in most cases, rigorous and harsh to break up a lease, for the violation of covenants which may be compensated in damages; and the present case appears to be one of that description.

The lease under consideration is to receive a double construction; a liberal one as to the thing leased, and the use and enjoyment of it by the lessee, so as to effectuate the intention of the parties; and a literal one to prevent the forfeiture.

The land was covered with heavy timber; and, for the use of it, the lessee was to pay a rent. The parties must, therefore, have intended that the lessee should be at liberty to fell the timber to a certain extent, at least, for agricultural purposes.

If the restriction to commit *waste* would operate to restrain the lessee from the use of the premises, it would be void, as repugnant to the grant. I shall have no difficulty in maintaining that, according to the common law of *England*, the lessee could not enjoy the land, nor derive any benefit from it, without the commission of waste; and should *that point be established, this covenant must be rejected. The general definition of *waste* is, that it is a destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him in remainder or reversion. It is not every injury to lands that the law considers as waste, nor every act which injures the remainder-man, or the reversioner. To test this supposed waste, by considering the reversioner injured by the acts done, is not warranted by law; and, in point of fact, when the premises were cleared of the timber, cleared land was more valuable than wood land. Cutting down *oak, ash* and *elm*, after they arrive at the age of 20 years, is waste, they being timber throughout *England*. (*Com. Dig. tit. Waste, D. 5. Co. Litt. 53. a. and b. 2 Roll. 280. l. 10.*) In the present instance, the case does not state what species of timber was cut down; but the land was covered with heavy timber, and was a forest; and I am free to admit, that other trees than *oak, ash* and *elm* may be the subject of waste, if they constitute the timber of

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the country where they grow. Every tenant has certain rights under his lease. Unless restrained from cutting wood altogether, he has a right to house-bote, fire-bote, plough-bote and fence-bote. For the purposes of fuel, he is bound first to take the dry, fallen and perishing wood; for the purposes of erecting necessary buildings, he has a right to fell timber, and so for the other botes; but I insist that, according to the common law of *England*, no tenant can cut down timber, &c., or clear land for agricultural purposes; and that the quantity of timber cut down never enters into the consideration whether waste has or has not been committed; but that it is always tested by the fact of cutting timber, without the justifiable excuse of having done it for house-bote, fire-bote, plough-bote or fence-bote. A single tree cut down, without such justifiable cause, is waste as effectually as if a thousand had been cut down; and the reason is this, that such trees belong to the owner of the inheritance, *and the tenant has only a qualified property in them for shade and shelter. (1 *Cruise*, 62, 63. tit. 3. s. 15. and 18.)

The doctrine of waste, as understood in *England*, is inapplicable to a new, unsettled country. If the parties before us intended that a sufficient quantity of timber should be left for the use of the farm, it was very easy to have inserted a covenant to that effect. We are tied down, in the present inquiry, to a literal, technical construction of the covenant, and have no right to go into the intention of the parties, or adopt any equitable notions. If this was an action of covenant to recover damages for having cut down all the timber on the premises, then, indeed, we should have a right to give the covenant not to commit waste a greater latitude of construction. The criterion set up by the plaintiff, to decide whether waste has been committed, is altogether fanciful and vague; and the case shows, that men differ very widely as to how much woodland ought to be left for the use of a farm. The rule furnished by the common law is fixed and certain; and the lessor knows what wood he may cut, and for what purposes; but if a covenant not to commit waste is hereafter to be considered as a covenant to leave a sufficient quantity of land in wood, no lessee is safe. If the act of cutting timber on the premises, without the justifiable excuse already stated, was not waste, cutting more or less was immaterial. Under the covenant not to commit waste, we have no right to say some waste might be committed, and other waste might not; the covenant is inapt to the case, and if any remedy exists, it must lie in covenant. I am, therefore, against granting a new trial.

YATES, J., was of the same opinion.

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Rule granted.

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By a map of the survey of a certain tract of land for which patents were issued, lots No. 15 and No. 16 were made to join each other, and by the mistake or fraud of the surveyor, according to the courses and distances of his survey, the line of lot No. 15 would not extend to lot No. 16, but left a vacant piece of land between them; it was held, that, after various means conveyances, during a lapse of near 18 years, the parties should be bound by their actual location, under their deeds, according to the metes and bounds given in the original survey, without reference to the map and patents. (a)

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What acts and declarations of parties will amount to such a practical location and construction by them, as to be binding and conclusive, though made under a mistake, as to the true extent of their legal rights. (b)

THIS was an ejectment for lands in *Walton*, in the county of *Delaware*. The cause was tried at the *Delaware* circuit, in *September*, 1809, before Mr. Justice *Thompson*. The principal facts proved at the trial were the same as stated in the same cause, on a former motion for a new trial. (See 4 *Johns. Rep.* 140.)

It was admitted, that *S. Wattles*, to whom lot No. 16 was patented, had conveyed the lot to *John Harper*, who conveyed it, in 1790, to *James Hawley*, who, in 1795, conveyed the same to *Robert Freeman* and another, all which conveyances referred to the map of partition.

The defendants produced a conveyance from *John Harper* to *Ansyl M'Call*, for 250 acres, part of lot No. 16, in 1793, described as "beginning at the north-west corner of *Thomas Hawley's* lot, and running thence north 60 degrees, east 34 chains and 32 links, then north 30 degrees, west 72 chains and 85 links, then south 60 degrees, west 34 chains and 32 links to the place of beginning."

Banajah M'Call, a witness, testified, that *A. M'Call* took possession immediately after the date of his deed; and the land between him and the river was in possession of the *Hawleys*; that he was acquainted with the *hemlock tree* mentioned in the deed, and that the *Hawleys* said that tree was their boundary, and *A. M'Call's* land was north-west; that the claim of the *Hawleys* did not extend to the premises in question; that *James Hawley* told him to what point his line extended, and it was not to the premises in question.

Edmund Weed testified, that *M'Call* was first in possession, above 18 years ago; that he knew the cross-line *between lots No. 15 and 16, and that the corner was a *hemlock tree*; that *Robert Freeman* took possession after the *Hawleys*, and he said that the land in possession of the defendants was a vacant lot. This possession was the same as that of the *Hawleys*, except what was in possession of *Griswold*, and who said he had his possession from the *Ogdens*. The witness testified, that the

(a) Acc. *Jackson v. Van Cerslaer*, 11 *Johns. R.* 123. *Jackson v. Hogeboom*, *Id.* 163. *Jackson v. Freer*, 17 *Johns. R.* 22. *Jackson v. Tullmadge*, 4 *Cowen*, 450. *Rockwell v. Adams*, 7 *Cowen*, 761. S. C. 6 *Wendell*, 467.

(b) Parol declarations and confessions of the parties as to the boundary between them, are admissible evidence, and an occupation, agreeably to such line for a long period of time, will not be disturbed. *Jackson v. M'Call*, 10 *Johns. R.* 377. And an agreement by parol as to locating or bounding land under a deed, will, it seems, bind the parties. *Doe v. Thompson*, 5 *Cowen*, 371. *Jackson v. Van Cerslaer*, 11 *Johns. R.* 123. But simply pointing out a mistaken line as the true one, where there is no uncertainty as to the proper location, will not conclude the party. *Jackson v. Douglas* 8 *Johns. R.* 367. *Stuyvesant v. Tompkins*, 9 *Johns. R.* 61. *Jackson v. Woodruff*, 1 *Cowen*, 376.

Hawley, were in possession 18 or 19 years ago, but he never knew them claim the premises in question.

Samuel Johnson, another witness, testified, that he was in possession of No. 15, twenty-two years ago, with *Goodrich*, and that they came there when *M'Call* last took possession of *Goodrich*, and they claimed to the west line of the *Ogdens*. There was a line of marked trees, which he supposed to be the east line of lot No. 15. They lived there five or six years. *Goodrich* always maintained that lot No. 15 extended up to lot No. 16, but never heard him say how far east No. 15 extended; that they frequently examined the east line of No. 15, and fixed it west of the possession of the defendants.

The judge charged the jury, that the lessors had made out a legal title to the premises in question, and that the only subject for their consideration was, whether the lessors had, by their acts, concluded themselves from claiming the possession; and declared his opinion to be, that they had not done any thing to conclude them. The jury found a verdict for the defendants.

A motion was made to set aside the verdict, and for a new trial, which was argued at the last *August term*.

E. William, for the plaintiff.

Foot, contra.

KENT, Ch. J., delivered the opinion of the court. This is a motion on the part of the plaintiff to set aside the verdict, and for a new trial.

*When this cause was heretofore before the court, on a like motion on the part of the defendants, a new trial was awarded to let in evidence of acts of the lessors of the plaintiff; and the court observed that there might be such acts as would be sufficient to conclude them. (4 *Johns. Rep.* 140.)

In considering the present motion, I shall take in one connected view such facts as have been presented to the court upon the former as well as upon the present motion, which remain uncontradicted.

Lots No. 15 and 16, in the patents in question, join each other, according to the map in the secretary's office; and the patents for those lots respectively refer to the map, and then describe each lot by courses and distances. But the courses and distances do not correspond with the map, and, no doubt, there is a vacant piece of ground (being the premises in question) lying between lots No. 15 and 16, provided those lots be located according to the courses and distances actually run, and the monuments actually established in the original survey made before the issuing of the patents. There was a super-numerary lot actually surveyed by *Wattles*, who run out the

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lots in the year 1785; and he run out 17 instead of 16 lots, and then, upon the map which he returned to the government, he omitted the 17th lot; and he took a patent for lot No. 16, and that patent, upon the face of it, and according to the map to which it refers, included the supernumerary lot.

It was, then, the mistake or the fraud of *Wattles*, which laid the foundation of the present controversy. *Wattles* conveyed lot No. 16 to *John Harper*, shortly after the date of his patent, and *Harper*, on the 10th July, 1790, conveyed lot No. 16 to *James Hawley*, from whom the lessors of the plaintiff derive title, and on the 12th July, 1793, a tract of land, described by metes and bounds, and containing 250 acres, and being the premises in question, to *Ansyl M'Call*, from whom the defendants derive title. The manner in which lot *No. 16 is described in the deeds to *Harper* and *Hawley*, is not stated in the case. We are not necessarily to conclude, that the lot No. 16, granted to *Hawley*, was commensurate with the lot No. 16, granted by patent to *Wattles*; for it does not appear, by the case, that the deed to *Hawley* referred to the patent, or adopted the description in it, with reference to the map on file in the secretary's office. It was competent for *Harper* and *Hawley* to limit the boundaries of lot No. 16, and make it less extensive than it would be if located by the map. The acts of the parties show that the lot, as granted by *Harper*, and as received by *Hawley*, was intended by them to be less extensive. Whether parce or not of the thing granted, is matter of evidence. This was so held by the judges of the K. B. in the case of *Doe*, ex dem. *Freeland*, v. *Burt*, (1 Term Rep. 701.) and it will be found to be a strong authority on the point. If we assume the fact to be, that the description followed the patent, the question will then be on the effect of the acts of the parties in locating their deeds. It is a mere question of location, and not of paper title. The courses and distances and marked trees, spoke one language, and the map another. All the parties in interest, from the year 1790 to the commencement of this suit, followed the actual survey, and took possession accordingly. They all considered the premises as a distinct lot, not included either in No. 15 or No. 16. They located according to the facts addressed to the senses, without having recourse to the secretary's office; and when the question of location was thus rendered ambiguous or uncertain, by the contradiction between the map and the survey, (and both were referred to in the patent and early deeds,) a practical location and construction given by the parties, and acquiesced in through a series of transfers, and for a great number of years, until the lands had become cultivated and had grown into value, cannot but operate with great, if not with decisive *force. It would be extremely inequitable for the plaintiffs now to be able to say, with the aid of the court, We have been all along under a mistake, and so

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have those from whom we derived title, and we have equally contributed to deceive the defendants, and him from whom they purchased; we can now go beyond our location, and the land which we supposed we had purchased, and can recover the defendant's farm, which we have constantly declared did not belong to us. On the motion for a new trial, for the mistake of a jury, the courts will always, in the exercise of a sound discretion, take some notice of the injustice of the claim. A man standing by and suffering another to build on his land, and setting up no right, though conusant of it, does, by this conduct, in equity, lose his land; (*East India Company v. Vincent*, 2 Atk. 83.) and in one case, such conduct has been held, at law, in an action of ejectment, a forfeiture of his right. (*Tarrant v. Terry*, 1 Bay's S. C. Rep. 239.) Though I do not acquiesce in the last decision, yet these cases show how unfavorably such claims have been viewed by courts.

There is no doubt that when *James Hawley* purchased lot No. 16, in 1790, he took possession according to the original survey, and thus practically defined his boundaries. It was proved, that when *M Call* took possession of the premises under his purchase from *Harper* in 1793, the *Hawleys* were in possession of lot No. 16, and they said that a certain hemlock tree was their boundary. This hemlock tree was one of the corners of lot No. 16, according to the original survey, and in exclusion of the premises. The premises lay north-west of this boundary, and *James Hawley* told a witness where his line extended to, and that it did not extend to the premises. These were the declarations of the owner of lot No. 16, contemporary with the purchase and settlement of the premises by *M Call*. The next owner of lot No. 16 was **Freeman*, whose title commenced in 1795, and he said that the land which the defendant was on was a vacant lot. *Griswold*, one of the lessors of the plaintiff, and who was in possession of lot No. 16, as early as 1797, accepted a covenant under seal from the defendants, by which they agreed to sell to him 50 acres, being part of the premises, and *Griswold* afterwards said that he had this possession from the defendants. *M Call* then took possession of the premises, with the knowledge and acquiescence of *Hawley*, and under a deed from the same person from whom *Hawley* derived his title. Every subsequent declaration and act of *Hawley* and his successors was calculated to strengthen confidence in the distinct titles derived from *Harper*, and it appears that the defendants were purchasers for a large consideration. It was incumbent upon *Hawley*, and those under him, to locate their deed truly, and to be conusant of its bounds. Here was uncertainty arising from the variance between the map and the actual survey, and the proprietors locate according to the latter, and hold out that to their neighbors, the possessors and claimants of the premises, as the true

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location. They go further: they purchase under the defendants' title. If these acts do not amount to a full recognition of that title, and concludes them from now correcting that location, I think they are enough to justify this court in not actively interfering to help them, by disturbing the verdict of the jury. They ought, at least, to be left to commence their action *de novo*.

Wattles, the patentee, and every person without exception, who has derived title from him, have acknowledged and acted upon the distinction between lot No. 16, as it appears upon the map, and the premises. *Wattles* himself created this distinction, and *Harper*, who took under him, supported this distinction, by his separate deeds to *Hawley* and to *M'Call*, and we have sufficiently noticed the declarations and acts of the subsequent purchasers.

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*The owners of lot No. 15, lying west of the premises, are also among the lessors of the plaintiff; but it would seem that lot No. 15 has no color of pretension to the premises. The owners of that lot located it west of the premises; for it was proved that *Johnson* and *Goodrich* were in possession of lot No. 15 when *M'Call* took possession east of them, and they claimed as far as to the defendants' west line, and this was supposed to be the east line of lot No. 15. *Johnson* and *Goodrich*, the lessors, frequently examined the east end of lot No. 15, and fixed it west of the defendants' possession.

Upon every view of this case, the court are accordingly of opinion, that the motion on the part of the plaintiff for a new trial ought to be denied.

VAN NESS, J., (*dissenting*.) When this cause was before us, on a former occasion, (4 *Johns. Rep.* 140.) we all agreed that the premises in question were included within the boundaries either of lot No. 15 or of lot No. 16; and that, as the lessors of the plaintiff had shown a title for both these lots, they had a right to recover, unless they had concluded themselves by establishing different boundaries from those given in the letters patent. The written agreement between *Goodrich* and the defendants, for the purchase by the former of fifty acres of the land, which was then supposed to lie between lots No. 15 and 16, was offered in evidence, on the former trial, as one, among other circumstances, to establish that the lessors of the plaintiff had thus concluded themselves; but the judge overruled it. We supposed that this agreement was admissible on the ground that "it might have been followed up by acts which would conclude *Griswold*, and those who derive title under him, from claiming the premises as within either of the lots;" and therefore lest "the defendants might have forborne to offer similar or inferior evidence of acts," &c., we awarded a new trial. Although the court did not expressly *determine

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that if the agreement had been admitted in evidence, the plaintiff still would be entitled to recover, unless it was followed up by further evidence, yet it is clear that such was then our opinion. Now I cannot discover any facts in the present case which ought to lead to a different conclusion from the one we before arrived at, when this cause was before us on a similar application. The evidence on the former trial is not so fully reported as it might have been, nor was it necessary in the view we then took of the case.

But waiving what we before said on this subject, let us consider the cause as it now stands. The question is whether, upon the facts before us, the present claimants have said or done any thing, or acquiesced in what has been done by others, so as to divest themselves of their title to the lands in controversy. There being no dispute about the facts, this is a question of law. Owing to some cause which is not explained, and about which we are left entirely to conjecture, the person who surveyed the lots in question committed an error which created some confusion in relation to the line between No. 15 and No. 16. *Goodrich*, who resided in *Connecticut*, was ignorant of the true extent of lot No. 16, and therefore agreed to purchase the 50 acres mentioned in the case from the defendants. Those from whom *Goodrich* derived his title were also deceived with respect to the true line of division between No. 15 and No. 16, and expressed an opinion that neither lot embraced the premises in question. Some few years ago, the error under which the proprietors of these lots labored was detected, and the defendants now set up this misconception of the lessors of the plaintiff as a defence in this action, and the court consider the defence to be valid. This is going much further than we have ever yet gone, and, in my opinion, to a most dangerous length. The extent which we have hitherto gone is, that when two persons, already having a title, have settled the line of division between them; or where one having title has made an actual location according to what he supposed to be his true line, and his neighbors have acquiesced in such location for a considerable length of time, that the boundary thus established shall remain undisturbed. But in this case, my brethren go greatly beyond the principle of our former decisions. Here the defendants, confessedly, have no title at all; and the judgment of the court is, that the true and undisputed owners have not only lost their rights, but that the defendants, after a possession for about eighteen years, have acquired a title which, it will be seen, is good against all the world. The government, it is conceded, have no claim to the property. The title must, therefore, be in some other person; and if it be not in the lessors of the plaintiff, then the defendants have it. It is thus that the acquiescence of those having the right, in ignorance of its actual extent, and a few loose parol declarations, are

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made to confer a title upon those who were trespassers when they entered, and who otherwise would have no right at all.

There is another view of this subject which, it appears to me, is equally conclusive against the defence which is relied upon. There can be no doubt that the lands in question fall within lot No. 16. One set of the lessors of the plaintiff derive title to that lot from *John Harper*, by his deed of *July, 1790*. *Harper* had no title to No. 15. All the right he had was to No. 16, and the whole of that, as described in the letters patent, he had conveyed to *James Hawley* three years before the conveyance to *Ansyl M'Call*, under whom the defendants claim. The parties thus derive their title from the same source. The defendants are in no better situation than *Harper* himself would have been if he had remained in possession of the premises, and the present action had been commenced against him. Now it would seem to me that *Harper* never would be permitted to avail himself of the defence insisted upon by the defendants; and if he would not, neither can the defendants. I am persuaded the more this view of the question is considered, the more conclusive it will appear against the defence which my brethren think it their duty to sanction.

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If I understand the argument of the counsel for the defendants, they rely in a great measure upon the evidence of adverse possession, considering probably (as I most certainly did) that our former decisions (for this is the third time this cause has been before us) had disposed of every other point. There is no force in this objection; and the only reason why I omit going fully into a consideration of this part of the case, is, because I have never understood my brethren, in conferring with them on this subject, that they placed their opinion at all on this ground. My opinion is, that the verdict is against law, and ought to be set aside, with costs to abide the event.

Motion denied.

JACKSON, *ex dem.* CLARK, against O'DONAGHY.

The privilege of the widow "to tarry in the chief house of her husband 40 days or until her dower be assigned to her,"

(*Laws*, sess. 10. c. 4.) will not protect her against an action of ejectment, brought after the forty days have elapsed, by the heir or any person deriving title from the husband.

If the widow's dower be not assigned during her *quarantine*, she may bring her action and recover damages from the day of her husband's death, but she cannot enter for her dower, until it is assigned to her, and after the forty days, the heir may expel her, and put her to her suit.

Patrick O'Donaghy was in possession of the premises in 1804, and continued in possession until the time of his death, in the autumn of 1806. A judgment was recovered in the *Onondaga Common Pleas*, in *October* term, 1806, against *William Dougherty* and *Patrick O'Donaghy*, before the death of the latter, for 127 dollars and 30 cents, at the suit of *Russel Clark*, on which a *fiery facias* *was issued, by virtue of which the premises in question were sold on the 27th *March*, 1807, to the lessor of the plaintiff, and conveyed to him by the sheriff. The defendant is the widow of *Patrick O'Donaghy*, and since his death, has remained in possession of the premises.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the facts above stated.

Forman, for the plaintiff.

Cady, contra.

VAN NESS, J., delivered the opinion of the court. The privilege of the widow to tarry in the chief house of her husband for forty days, or until her dower be assigned her, does not protect her from an action of *ejectment* by the heir, or any person deriving title from him, after the forty days have elapsed. There is some difference between the words of our statute, (1 *Rev. Laws of N. Y.* 51.)† and *magna charta*, (c. 7.) from which the statute was taken; but it is a difference. I apprehend, in the words only. In the former, the expression is, that the widow "shall tarry forty days, &c., or until her dower be assigned," &c., and in the latter, she "shall tarry forty days, &c., within which time her dower," &c.

It is supposed, that under our statute the widow has a right to her quarantine until her dower be assigned her. If this had been the intention of the legislature, then the limitation of it to forty days would be useless. The construction, therefore, of our statute and *magna charta* must be the same; and that of the latter appears to be well settled.

If the widow's dower is not assigned her during her quarantine, she has her right of action, and she shall have her damages from the day of her husband's death, when he dies seised. A widow cannot enter for her dower until it is assigned her, "because it doth not appear, before assignment, what part of the lands or tenements *she shall have for her dower." (*Litt.* 43. *Co. Litt.* 37. b.) She is not a tenant in common with the heir. Her right rests in action only; and after the expiration of the forty days, the heir can expel her, and put her to her suit. (*Co. Litt.* 34. b.) In a case reported in *Jenk. Cent.* (184. case 16.) it was ruled by all the judges, that the widow may live in the chief house of her husband for forty days, and no

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† 1 R. S. 792
sec. 17

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longer. It must have been to remedy this hardship upon the widow, that dower *ad ostium ecclesie*, and *ex assensu patris*, was introduced, so that she might enter immediately upon the death of her husband, and not be driven to her action. The true construction of our statute and of this part of *magna charta* appears to be, that the widow shall enjoy her quarantine for forty days, unless within that time her dower be assigned her.

The only instance which has fallen under my observation, in which this construction of *magna charta* has been questioned, is a *dictum* of Gould, J., in the case of *Goodtitle v. Newman*, (3 Wils. 519.) where he said, "that the court would not turn the widow out until her dower was assigned to her;" but he was undoubtedly mistaken.

Judgment for the plaintiff.

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Where mutual
covenants go
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only to a part of the consideration, and a breach of that part may be paid for in damages, the defendant cannot set it up as a condition precedent; but the covenants in such case are regarded as independent. (a)

In an action of covenant, the plaintiff declared, that in consideration of 400 dollars paid to the defendant, he promised and agreed to

convey, on the 1st December, 1802, to the plaintiff, a certain lot of land lying in N., the same to be appraised by A. and B.; and if appraised at more than 400 dollars, the plaintiff was to pay to the defendant the surplus; and if at less than that sum, so much was to be deducted, &c., and averred that he was ready to receive a deed; but the defendant did not convey, &c. On demurrer, the declaration was held good.

THIS was an action of covenant. The declaration stated, that the testator, on 22d February, 1802, at Chenango, *&c., by his certain writing obligatory, sealed, &c., promised and agreed with plaintiff, in consideration of 400 dollars to him paid, to convey to the plaintiff, on or before the 1st day of December then next, one certain lot of land lying in Nanticoke, the same to be appraised by G. Storer and Elijah Higbe; and if said lot of land should be appraised over the sum of 400 dollars, &c. same was to be made up to the testator; and if it was appraised under 400 dollars, the sum which it fell short was to be deducted out of certain notes given by Lombard and Jones. The plaintiff averred, that he was ever ready to receive a deed of said lot, until the 1st day of December was past, and that the testator did not deed or convey to him the said lot, and that the testator was in full life until after the 1st December, and so the testator broke his covenant, &c. To this declaration there was a general demurrer and joinder.

(a) Acc. *Tompkins v. Elliot*, 5 Wendell, 496, where the court lay down some general rules, deduced from the adjudged cases, by which to determine what covenants are dependent and what independent.

Van Vechten, in support of the demurrer.

Sedgwick, contra.

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Per Curiam. The two principal objections to the declaration in this case are, 1. That the plaintiff has not averred that the lands were appraised, or that he was ready to pay the overplus moneys (if any) upon such appraisement; 2. That the land is not described with the requisite certainty.

There does not appear to be sufficient weight in either of these objections.

1. Assuming that there was a covenant on the part of the plaintiff, to pay for the amount of the appraisement beyond the 400 dollars, yet it only went to a *part* of the consideration, and the rule is settled, that where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, the defendant shall not set it up as a condition precedent. The covenants in such case are to be regarded as independent. (*Boone v. Eyre*, *1 *H. Black.* 273. n. *Campbell v. Jones*, 6 *Term Rep.* 570. 1 *Saund.* 320. n. c.) The damages sustained would be very unequal, if the covenant of the plaintiff was held to be a condition precedent. He in the mean time loses his 400 dollars, and the testator might not lose any thing. The plaintiff had in part (at least) *executed* the bargain, by paying the 400 dollars, and the testator ought not to keep that sum without conveying the land, because that *possibly* there may be a surplus to receive, and he may sustain some damage by the plaintiff not tendering that surplus. This would be unjust. He is bound to convey, and he may then resort to his action, if a surplus should be found to exist upon the appraisement.

2. The testator covenanted to convey "one certain lot of land lying in *Nanticoke*," and he has received what was presumed at the time to be the full consideration. It cannot surely lie in his mouth to say that he cannot convey because of uncertainty in the description. The grant would be good by the description in the covenant; and the grantee could render it effectual by averment, as to the certainty of the place and of the lot; *id certum est quod certum reddi potest*.

Judgment must, therefore, be rendered for the plaintiff.

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TEELE, *qui tam*, &c., against FONDA.

Where a person purchases land, knowing at the time that the same is held adversely to the person of whom

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he purchases, by persons claiming by deed, he is liable, under the "act to prevent and punish champerty and maintenance," to an action for the value of the land, held adversely, and the improvements thereon. (a)

THIS was an action of debt brought on the statute "to prevent and punish champerty and maintenance," (*Laws*, vol. 1. sess. 24. c. 87. p. 345.) (b) against the defendant, for purchasing, on the 19th December, 1806, of Nathaniel Ogden, lot No. 78, in the township of *Manlius*, in the county of *Onondaga*, the said Ogden pretending title thereto, but being *disseised thereof at the time of the purchase. Plea, *nil debet*.

The 8th section of the statute declares, "that no person shall buy or sell, or by any means procure any pretended right or title, or make or take any promise, grant, or covenant to have any right or title of any person to any lands, tenements or hereditaments, unless such person who shall so bargain, sell, covenant or promise the same, or his ancestors, or those by whom he claims the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents and profits thereof, for the space of one whole year next before the said bargain, &c., upon pain that he who shall make any such bargain, &c. shall forfeit the whole value of such lands, tenements or hereditaments; and the buyer or taker thereof, knowing the same, shall also forfeit the value of the said lands, tenements or hereditaments; the one half of the said forfeitures to be to the use of the people of the state; and the other half to the party that will sue for the same in any court of record," &c.

The cause was tried at the *Onondaga* circuit, the 4th June, 1810, before the *chief justice*.

At the trial, *Miller*, a witness for the plaintiff, testified, that in 1804 or 1805, *Ogden* offered to sell the lot to him, but the witness declined purchasing, as he had bought the land once, and told *Ogden* that the lot was settled by a number of persons, several of whom had got deeds, and the witness then lived on the land. Another witness also testified that, in 1805, he told *Ogden* that he had surveyed and subdivided the lot by direction of *Judah Williams*, and that several settlers had made improvements on the lot under *Williams*.

L. Foster also testified that in December, 1806, in an answer

(a) One who sells land without the knowledge that there is a subsisting adverse possession, is not liable to the penalty for selling a pretended title. Such knowledge will, however, be presumed in the first instance. *Hassenpats v. Kelly*, 13 Johns. R. 466. *Lane v. Shears*, 1 Wendell, 433. But if he sells land held adversely, the fact that his title is good is no bar to an action for the penalty. *Tomb v. Sherwood*, 13 Johns. R. 289. Of the legal or equitable interest which is sufficient to protect a party against the penalties of the statute, vid. *Wickham v. Conklin*, 8 Johns. 220. *Thallimer v. Brackerhoff*, 20 Johns. R. 386. S. C. 3 Cowen, 623. *Cambell v. Jones*, 4 Wendell, 306. The statute does not apply to judicial sales. *Huttle v. Jackson*, 6 Wendell, 213.

(b) 2 R. S. 691. sec. 5, 6, 7.

to the inquiry of the defendant about the lot, and the settlers, the witness informed him who the persons were who had settled on the lot; that the defendant then informed the witness, that he purchased the lot of *Ogden* at *Coeymans*; that before the purchase, *Ogden* told him that *he claimed the lot, that there were settlers on it, but he would not lose it; that he was not in a situation to recover it, but wished the defendant to bring actions for that purpose; and that the adverse title was from *Eli* to *Williams*, and from the latter to the settlers. The defendant also told the witness that he did not think he could hold the lot, but he should not lose any thing, as *Ogden* was to make him good, if he lost the lot, and showed a deed from *Ogden*; and at the same time inquired the names of the persons in possession, in order to bring actions of ejectment against them.

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The plaintiff also gave in evidence several title deeds, dated in 1800, 1802 and 1805, to the several persons in possession of the land, and various acts of ownership were also proved prior to 1806. The value of the improved land under cultivation, being about 132 acres, and including houses, barns, orchards, &c., was proved to be 3,225 dollars. The present suit was commenced the 14th November, 1807.

The defendant gave in evidence an award of the *Onondaga* commissioners.

The *chief justice* charged the jury, that, in his opinion, the plaintiff was entitled to recover the sum of 3,225 dollars, being the value of the improved land; and the jury found a verdict for the plaintiff accordingly.

A motion was made, in behalf of the defendant, to set aside the verdict, and for a new trial; 1. Because the *chief justice* misdirected the jury; 2. Because the plaintiff did not prove that *Ogden* was disseised of all the land, for the value of which the verdict was given, nor that the defendant knew that *Ogden* was disseised.

Cady, for the defendant. He cited 2 *Hawk. P. C. Champerty*, p. 409. s. 14. and p. 419. s. 11. 1 *Johns. Cas.* 85.

**Gold*, contra, cited 1 *Caines's Rep.* 358. 2 *Caines's Rep.* 183.

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Per Curiam. The evidence is full and complete, that when the defendant bought and purchased the lot in question, on the 19th of December, 1806, the whole lot was claimed by deed, by persons under a title hostile and adverse to the title then set up by *Ogden*; that the lands, for the value of which the plaintiff has taken a verdict, were then under actual cultivation, and possessed under such adverse title; and that all this was known to the defendant at the time of his purchase, and that

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he purchased with a view of contesting at law, the title set up by the persons in possession. There is no ground whatever to set aside the verdict, and the motion must be denied.

BRISTOL against BURT.

To constitute a conversion sufficient to support trover, it is not necessary to show a manual taking of the thing in question; nor that the defendant has applied it to his own use; but the assuming the right to dispose of it, or exercising a dominion over it, to the exclusion, or in defiance of the plaintiff's right, is a conversion. (a)

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THIS was an action of *trover*, brought to recover the value of 95 barrels of potashes. The cause was tried at the *Onondaga* circuit, the 7th June, 1810, before the *chief justice*.

The defendant was, in 1808, and still is, the collector of the port of *Oswego*, on the south side of lake *Ontario*. In May, 1808, the defendant was applied to, to know whether he would grant clearances for ashes for the port of *Sackett's Harbor*, which is the next adjoining port in the county of *Jefferson*, and on the south side of the lake, and adjacent to the province of *Canada*. The defendant answered that he did and should continue to grant clearances; and the defendant was informed of the intention of the plaintiff to bring ashes to *Oswego*, for the purpose of sending them to *Sackett's Harbor*. About the first July, the plaintiff sent 95 barrels of potashes to *Oswego*, which were put into the store of a Mr. *Wentworth*, who gave the plaintiff a receipt for them. The plaintiff applied to the defendant for a clearance, in order to transport the ashes to *Sackett's Harbor*, but the defendant refused to grant it; alleging as a reason for his refusal, that though he did not suspect the plaintiff intended to send the ashes to a *British* port, yet he believed that the collector at *Sackett's Harbor* would not do his duty, and that the ashes would be sent from thence to a *British* port. The defendant at the same time promised the plaintiff, that if he did not receive instructions to the contrary from the secretary of the treasury, within a fortnight, he would give a clearance to the plaintiff's ashes. After the expiration of that time, the defendant still refused to grant the clearance, though he admitted that he had received no new instructions from the secretary of the treasury, nor had he received any instructions forbidding such clearances. He assigned no other reason for his refusal, than his suspicion that the collector at *Sackett's Harbor* would not do his duty, and persisted in refusing a clearance, though the plaintiff offered to give bonds that the ashes should be delivered at *Sackett's Harbor*. The

(a) Acc. *Shotwell v. Few*, *infra*, 302. *Murray v. Burling*, 10 Johns. R. 172. *Lockwood v. Bull*, 1 Cowen, 322. *Reynolds v. Shuler*, 5 Cowen, 323. *Bissell v. Drake* 19 Johns. R. 66.

plaintiff then expressed his desire to take the ashes *up the river*; but the defendant declared that the plaintiff should not take them from *Wentworth's* store, unless he gave bonds for double the value of the property, to carry the ashes to *Rome*, in the county of *Oneida*, and leave them there, while the embargo continued; that the property was under his jurisdiction and charge; that he had a control over all the stores and wharves where ashes were placed, and had employed armed men; and that he had the right to prevent their removal, and would exercise it. Two armed men were stationed near *Wentworth's* store during two nights, and an armed *sentinel* was constantly on duty, night and day, at the public store of the collector, *within ten rods of *Wentworth's* store, and in view of it, for the purpose of observing boats, and preventing the removal of property. The defendant avowed his determination not to permit any ashes to be removed from any of the stores in *Oswego*. The defendant demanded the ashes in question from *Wentworth*, who refused to deliver them; but in order to prevent the defendant from proceeding to extremities, and to satisfy him, *Wentworth* entered into an agreement with the defendant, not to deliver any property from his store, without the permission of the defendant.

In the autumn of 1808, the defendant gave a general permission to remove any ashes from *Oswego* up the river, and 13 barrels of the potash of the plaintiff were delivered by *Wentworth* to his order.

On the 13th *February*, 1809, the defendant gave a written permit to carry the remaining 82 barrels of potashes from *Oswego* to *Rome*, in the county of *Oneida*, requiring of the person to whom they were delivered by order of the plaintiff, a written report of the ashes, and an oath that the statement was true, and that he did not intend to violate the law.

It was proved, that when the plaintiff applied to the defendant for a clearance to *Sackett's Harbor*, potashes were worth at that place 180 dollars per ton, and that the expense of transportation was 4 dollars per ton. That the price of potashes on the 21st *July*, 1808, in the city of *New-York*, was 173 dollars per ton, but would not sell at *Salina*, in the county of *Onondaga*, for more than 150 dollars. That when the plaintiff received the ashes, the price of them, in the city of *Albany*, was 137 dollars and 50 cents, and the expense of transportation from 25 to 30 dollars per ton.

The *chief justice* charged the jury, that in his opinion, there was sufficient evidence of a conversion by the defendant, and that the plaintiff was entitled to recover *for the difference in the value of the ashes at the time when he demanded a clearance, and at the time he received them. And the jury found a verdict for the plaintiff, for 1,472 dollars and 20 cents.

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A case was made for the opinion of the court, which it was agreed might be turned into a special verdict.

Gold, for the plaintiff, cited 6 *East*, 538. 6 *Term Rep.* 298
1 *Burr.* 31.

Cady, contra, cited 5 *Bac. Abr.* 279. *Trover*, G. *Bull. N. P.* 44. 3 *Salk.* 284.

Per Curiam. The only point made in this case is, whether there was sufficient evidence of a conversion to justify the verdict.

There were declarations and acts of the defendant united to form a control over the plaintiff's property. The very denial of goods to him that has a right to demand them, says Lord *Holt*, in *Baldwin v. Cole*, (6 *Mod.* 212.) is a conversion; for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without a cause, takes upon himself the right of disposing of them. The bare denial to deliver is not always a conversion, as in *Thimblethorpe's* case, (cited in 2 *Bulst.* 310. 314.) where a piece of timber was left upon the land of the defendant by the lessee at the expiration of his term, and he was requested to deliver it, and refused, but suffered the timber to lie without intermeddling with it. The reason why this was held not to be a conversion was, that there was no *act* done or dominion exercised; but, in the present case, there were the highest and most unequivocal acts of dominion and control over the property; not only by claiming jurisdiction over it, but in placing armed men near it, to prevent its removal. This fact is, of *itself, a conversion. It is intermeddling with the property in the most decisive manner, and detaining it for months in the storehouse. It was therefore bringing a charge upon the plaintiff; and this, says Mr. Justice *Buller*, in *Syeds v. Hay*, (4 *Term Rep.* 260.) amounts to a conversion. Neither the case of *M'Combie v. Davies*, (6 *East*, 538.) nor the *anonymous* case in 12 *Mod.* 344. were so strong as this, and yet the conversion was maintained. It was assuming the dominion of the property which was made by Lord *Ellenborough* the test of the conversion, though the property in that case lay not in the defendant's, but in the king's warehouse. The definition of a conversion in *trover*, as given by Mr. *Gwillim*, the editor of *Bacon*, and now a judge in *India*, applies precisely to this case. (6 *Bac. Abr.* 677.) "The action being founded upon a conjunct right of property, and possession, any act of the defendant," says he, "which negatives, or is inconsistent with such right, amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question, by the

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defendant; it is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion, or in defiance of the plaintiff's right? If he does, that is, in law, a conversion, be it for his own or another person's use."

We are, therefore, of opinion, that the motion to set aside the verdict must be denied.

Motion denied.

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KENT
v.
WELCH

A. KENT against WELCH.

THIS was an action of covenant. The declaration stated, that by a deed, dated the 3d of *March*, 1784, and *executed by the defendant, he, in consideration of 50*l.*, did *give, grant, bargain and sell* to the plaintiff, in fee, a tract of land in *Vermont*, and engaged to *warrant and defend* the same against all claims or demands of any person claiming under him, or any person whatsoever; and the plaintiff averred that the defendant, at the time, was not *seised* in fee, and that he has not warranted and defended the land as aforesaid, and that the defendant, at the time, had not any estate in the land, and so the defendant has broken his covenant, &c. The defendant pleaded, 1. That he hath not broken his covenant; 2. That the deed was made in reference to the laws of *Vermont*, and that the cause of action arose there, and that all suits for breach of covenants, in deeds, must be brought within 10 years; and that ten years had elapsed before suit brought, and this he was ready to verify, &c. There was a *general demurrer* to the second plea, and joinder.

In an action on
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a covenant contained in a deed by which the grantor "gave, granted," &c., and engaged to warrant and defend the land against all claims, &c., it was held, that no action could be maintained either on the implied or express covenant, without alleging and proving an eviction, (a) and that the express warranty qualified and restrained any implied covenant of seisin arising from the word *give*. (b)

Crary, in support of the demurrer, cited 2 *Caines*, 188.

Foote, contra, cited 1 *Term Rep.* 584. *Cro. Eliz.* 914. *Cro. Jac.* 425. *Greenby & Kellogg v. Wilcocks*, (2 *Johns. Rep.* 1.) *Selwin's N. P.* 413.

(a) An action may be maintained on a covenant of *seisin*, though the plaintiff has never been evicted. *Pollard v. Dwight*, 4 *Cranch*, 421. For a covenant of *seisin*, if broken at all, must be so at the instant it is made. *Abbott v. Allen*, 14 *Johns. R.* 248. Covenants for *quiet enjoyment* and a *general warranty* are only broken by a lawful eviction of the grantee. *Sedgwick v. Hollenback*, *infra*, 376. *Van Slyck v. Kimball*, 8 *Johns. R.* 198. *Vanderkarr v. Vanderkarr*, 11 *Johns. R.* 122. *Whitbeck v. Cook*, 15 *Johns. R.* 483. But on a covenant against *encumbrances*, the purchaser need not wait until he is evicted, but may satisfy an outstanding encumbrance, and then resort to his action on the covenant, and the measure of damages is the price he has paid for it. *Delavergne v. Norris*, *infra*, 368. *Stannard v. Eldridge*, 16 *Johns. R.* 254. *Hall v. Dean*, 13 *Johns. R.* 106. See, also, *Duwall v. Craig*, 2 *Wheat.* 45. *Day v. Chism*, 10 *Wheat.* 449.

(b) An express covenant in a deed uniformly takes away an implied one. *Vanderkarr v. Vanderkarr*, 11 *Johns. R.* 122.

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Per Curiam. Here are two covenants in this deed; 1. The implied covenant or warranty in law, by force of the word *give*, and which is good only for the life of the grantor; 2. The express covenant on the warranty against all claims and demands. But before there can be any remedy upon either covenant, there must be a lawful eviction averred and shown, and the declaration is bad for want of this averment. The implied covenant here is a covenant of warranty, and so it appears from the cases referred to in the opinion of the court in *Frost v. Raymond*; (2 *Caines*, 188.) and it is well understood that under a covenant of warranty the plaintiff must show an eviction. (a) (2 *Johns. Rep.* 1.) This objection is fatal to the plaintiff's action.

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*Even if the word *give* implied a covenant of *seisin*, as the counsel must have supposed; yet as there was an express covenant of warranty, it would have qualified and restrained the implied covenant within the import and effect of the express covenant, so that the former never shall be broader than the latter. This is also a settled rule, as appears from *Noke's* case, (4 *Co.* 80.) and the other authorities referred to in 2 *Caines*, 192. On no ground, therefore, can the plaintiff recover.

Judgment for the defendant.

(a) The words "grant and demise," in a *lease for years*, import covenants of warranty and for quiet enjoyment, and in an action on them it is not necessary to aver an eviction. *Grannis v. Clark*, 8 *Conen*, 36. *Barney v. Keith*, 4 *Wendell*, 502.

ANDRES against WELLS.

An action for a libel lies against the proprietor of a gazette edited by another, though the publication was made without the knowledge of such proprietor. (a)

But where a printing press and newspaper establishment were assigned

to a person merely as security for a debt, and the press remained in the sole possession and management of the assignor, this was held not to be such an ownership in the person holding the security or lien, as would render him liable to an action as proprietor.

THIS was an action on the case for a libel.

The cause was tried before Mr. Justice *Van Ness*, at the *Rensselaer* circuit, in June, 1810.

The libel was proved to have been published in the *Troy Gazette*, the 3d October, 1809; the paper was printed by *John C. Wright*, who was the editor.

It was proved that the defendant, after the publication of the libel in question, admitted that he was one of the proprietors. *Wright* and two others were owners of the press and establishment, and assigned the same to the defendant and *Thomas*

(a) So the publisher of a libel is responsible to the party libelled, notwithstanding it is accompanied with the name of the author. *Dole v. Lyon*, 10 *Johns. R.* 447. And see *Lewis v. Fox*, 6 *Johns. R.* 1.

The case of *Andres v. Wells* has been recognized in the Court of Errors as settled law. *Vid. King v. Root*, 4 *Wendell*, 136.

Hillhouse, as security for their endorsement on certain notes; but they did not receive the profits of the paper, nor had they any agency in its publication; nor were they consulted about the articles inserted, the same being left to the exclusive management of *Wright*. By the agreement between *Wright* and the defendant and *Hillhouse*, if the notes were not paid, the press and establishment were to be the absolute property of the defendant and *Hillhouse*. *Wright*, with their assent, afterwards sold the press, &c., to one *Lewis*, and discharged the defendant and *Hillhouse* from their responsibility on the notes. During the time the defendant and *Hillhouse* held the assignment as security, they did not take possession of the press, nor advance any money to pay the workmen; but the same was conducted solely at the expense of *Wright* and the original owners.

The judge told the jury, that if they believed the witnesses, as to the assignment and the nature of the interest of the defendant, he would be entitled to a verdict; on which the plaintiff submitted to a nonsuit, with liberty to move the court to set it aside, and grant a new trial.

J. Russel, for the plaintiff. 1. In the case of *Rex v. Walter*, (3 *Esp. N. P. Cas.* 21.) Lord *Kenyon* held it to be clear and settled law, that the proprietor of a newspaper was answerable criminally, as well as civilly, for the acts of his servants or agents, for any misconduct in the conducting of a newspaper; and he stated this to be the opinion of Lord *Hale*, Justice *Powell* and Justice *Foster*. In *Rex v. Almon*, (5 *Burr.* 2686.) Lord *Mansfield* stated the law to be, that buying a pamphlet in the shop of a bookseller and publisher, of a person acting in the shop, was a *prima facie* evidence of a publication by the master himself. (See, also, *Rex v. Nutt*, *Bull. N. P.* 6. *Harris's case*, 2 *St. Tr.* 1037.) There can be no doubt as to the law on this point.

2. The defendant admitted he was one of the proprietors, and though the press and establishment were assigned to him and *Hillhouse* as security, it makes no difference. His own admission and acts are sufficient to make him answerable. He had, at least, a qualified property, which enabled him to control the printer, who is to be regarded as his agent or servant. Evidence of a person's being a servant *de facto*, is enough. (2 *Term Rep.* 168.)

Foot and *Van Vechten*, contra. 1. The defendant cannot be liable to this action, unless he had some knowledge of, or was privy to the publication. To render a person liable for a libel, he must be the contriver, procurer, or publisher of it, knowing it to be a libel. (*Lambe's case*, 9 *Co.* 59. *Adjudged Cases*, 613. *Fitzgibbon*, 47.) The case of the *King v. Almon* con-

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firms this doctrine. Ownership is mere *prima facie* evidence of liability, and which may be contradicted. If the publication was made without the knowledge of the defendant, he ought not to be responsible for the act of another, of which he was totally ignorant. No knowledge of the publication is brought home to the defendant; nor is there any evidence of any act or concurrence on his part, as to the publication. Malice cannot be presumed where there is no knowledge; and there ought to be some evidence of a criminal intent. (4 *Term Rep.* 126.) The case of *Rex v. Walter* is not the law in regard to libels, as laid down in *Lambe's case*, and the case of the *King v. Almon*.

SPENCER, J., delivered the opinion of the court. Two questions arise in this case, for our consideration.

1. Is a proprietor of a newspaper, in which a libel is published, answerable by action, though he has no concern in conducting it, and the publication was without his privacy?

2. Is the defendant to be considered, in point of fact, such proprietor?

In the case of *Rex v. Walter*, (3 *Esp. N. P. Cas.* 21.) Lord *Kenyon* was clearly of opinion that the proprietor of a newspaper was answerable criminally, as well as civilly, for the acts of his servants or agents, for misconduct in conducting a newspaper; and he said it was not his opinion only, but that of Lord *Hale*, Justice *Powell*, and Justice *Foster*; that it was the old received law for above a century, and was not to be broken in upon by any new doctrine upon libels; and, under this opinion, the defendant was found guilty, though it was shown he had nothing to do with conducting the paper, resided entirely in the country, and that it was conducted by his son, without any interference on his part.

The defendant's counsel contend, that the law is otherwise, and they rely on *Lambe's case*, (9 *Co.* 59.) and the *King v. Almon*, (5 *Burr.* 2686.) In *Lambe's case* it was resolved, among other things, that to convict a person of a libel, he ought to be the contriver, procurer or publisher of it, knowing it to be a libel. In the *King v. Almon*, the *selling a libel by a servant, in the defendant's shop, was held *prima facie* evidence of a sale by the master's orders; but it was admitted by the court, that this presumption might be repelled. There is, in fact, no contradiction between these cases. The law, as laid down in *Lambe's case*, is general. The court were not called on to say how far the master is responsible for the act of his servant; and in *Almon's case*, the admission that the defendant might repel the presumption, went on the principle that the master might show that the act of his servant was not attributable to him, in so far as the servant exceeded his authority. But where a man is the owner of a paper, and

gives over the conducting of it to another, he thereby constitutes him his general agent; and is answerable for all his acts done in the execution of that trust, whether within or beyond the intention of the principal. The case of the *King v. Topham*, (4 Term Rep. 126.) in which the court was unanimous, contains the same doctrine as the case of the *King v. Walter*; that the proprietor of a paper is answerable for the publication of a libel. It would be too much to say, that any man might with impunity own and sustain a public newspaper, without any responsibility for the libels with which it might abound. The principle laid down by Lord *Kenyon* is salutary and essential.

On the second point there is some seeming contrariety; the defendant admitted that he was one of the owners and proprietors of the paper in which the libel was published, and that he and another employed the workmen. But it appeared from the testimony of two witnesses called by the defendant, that the press and other things were assigned by the former proprietors to the defendant and *Hillhouse*, as security for a debt; that they never took possession of the press nor furnished any materials, nor paid the workmen, nor received any of the profits; that it was not sold by them, but by others, when the defendant was released from his responsibility, and ceased to have any interest in the press. The judge declared, that if the jury believed the *facts there proved, he should direct them to find for the defendant; and the plaintiff submitted to a nonsuit. If the facts proved by the defendants are conceded to be true, (and the submitting to a nonsuit is such a concession,) the judge was correct in the opinion he gave. The defendants are not to be considered absolute proprietors, but rather as mortgagees; the mortgagor being left in possession, such a *lien* is not that kind of ownership which is requisite to render a person liable in this action as a proprietor.

Judgment of nonsuit.

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THOMAS *against* CROSWELL.

To publish of a member of Congress, "he is a fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker, he has abandoned his post in Congress, in pursuit of an office," is libellous.

And whether the person so libelled did leave his post, for the purpose imputed to him, or had violated his duty as a

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Whether publications by the defendant against the plaintiff, subsequent to the libel charged in the declaration, and which are in themselves libellous, can be admitted in evidence to show the malice of the defendant in publishing the original libel? *Quære.*

Though a person may publish a correct account of the proceedings in a court of justice, yet if he discolors or garbles the proceedings, or adds comments and insinuations of his own, in order to asperse the character of the parties concerned, it is libellous.

THIS was an action for a libel, published in a gazette, called "*The Republican Crisis*." The cause was tried at the *Washington* circuit, in June, 1810, before Mr. Justice *Van Ness*.

The libel set forth in the declaration was as follows: "On *Friday* last, the legislature appointed a new treasurer, in the room of Mr. *L.*, who has filled the office for several years, and performed the duties with perfect fidelity and ability. This measure had been determined on from the moment Mr. *L.* took the liberty of exercising the right of a freeman, in supporting such a candidate for governor as he deemed most suitable to fill the office. From that moment, too, a fawning sycophant, by the name of *David Thomas*, (a misrepresentative in Congress, and a major-general by commission,) had fixed his eye upon the office. Accordingly, when the legislature of the session was about *commencing, this Mr. *Thomas* abandoned his post in Congress, and made his appearance in *Albany*. The object of his visit was not left to conjecture, for he openly avowed it. Under the circumstances, it was hoped Mr. *Thomas* would not succeed. It was hoped that the legislature would frown this creeping sycophant, this grovelling office-seeker, back to his duty at *Washington*; that they would spurn at his impudent attempt at reaching after blessings. But the hope of his disappointment did not rest on this ground alone. Doubts existed both as to his ability and his integrity. We are told that letters were circulated among the members of the legislature previous to taking the question on the appointment, in which it was stated, that this *David Thomas*, a few years since, was indicted by a grand jury of *Washington* county, for receiving a quantity of counterfeit money, with intent to pass it. That, on his trial, before the *petit* jury, one witness expressly swore to the fact; but this witness being an accomplice, his testimony was not deemed sufficient to convict the accused, and on this ground alone he was acquitted."

The publication of the libel, on the 2d *February*, 1808, by the defendant, was proved; and it was admitted, that the paper in which it was published had extensive circulation, and that the libel referred to the plaintiff.

The defendant read in evidence a record of the indictment, trial and acquittal of the plaintiff, by which it appeared that the plaintiff was indicted at a Court of *Oyer and Terminer*, held in *Washington* county, in the year 1797, for knowingly receiving certain counterfeit bank bills from one *Samuel A. Gibbs*.

with intent to pass them; on which indictment he was tried and acquitted by the jury.

The defendant then called several witnesses to show what took place at that trial. It appeared that *Gibbs* and some others, his associates, had been apprehended for passing *counterfeit bills*, and were confined in gaol in *Washington* county; and *Gibbs* sent for the plaintiff, (who was the only acting magistrate in *Salem*, where *Gibbs* was confined,) for *the purpose of making some disclosures. The gaoler was called out of the room and left the plaintiff with *Gibbs*, but returned in less than two minutes, and, in the opinion of the gaoler, who was a witness, it was not possible for *Gibbs* to have delivered the bills, as he pretended, to the plaintiff, during the absence of the witness. A witness proved, that *Gibbs* had said, "He would send the plaintiff to the state prison, if he should roast in hell for doing it;" and several other witnesses also testified to similar declarations of *Gibbs*, to show his malice against the plaintiff, and it was proved that he was a person of bad reputation, and destitute of veracity. *Gibbs* was the only witness on the trial of the plaintiff on the indictment.

Two newspapers entitled "*The Republican Crisis*," one dated the 16th *February*, and the other the 22d *July*, 1808, and also two papers called "*The Balance*," dated the 2d and 13th *June*, 1809, published by the defendant, were offered in evidence to show the malice of the defendant against the plaintiff. The defendant's counsel objected to reading any papers in evidence, which had been published since the commencement of this suit; but the objection was overruled by the judge. The first two papers were then proved to have been printed at the press of the defendant; and no objection being made for want of proving that the other two papers were also printed by the defendant, the whole were read in evidence.

It was proved that the plaintiff was a member of Congress in the winter of 1808, when Congress was in session, and that he came from *Albany* to *Washington* a short time before he was appointed treasurer of this state, and was in *Albany* at the time of his appointment, and immediately after entered on the execution of the duties of his office, and did not return again to *Washington*; and that a paper containing the charge against the plaintiff as to the indictment, &c., was circulated and delivered to several members of the assembly, on the morning of the day of his appointment, and previous to the passage of the bill for that purpose.

*The judge charged the jury, that the charges of sycophancy, grovelling office-seeking, and misrepresentative in Congress, were clearly libellous; but if the jury believed that the plaintiff had abandoned his post in Congress in pursuit of the office of treasurer, and that such abandonment of his place was a violation of his duty as a member of the house of representatives,

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the charges were substantially supported, and that it was not necessary for the defendant to prove them literally true. As to the other part of the libel, he observed, that it was undoubtedly true that the defendant had a right to publish a correct statement of the indictment against the plaintiff, and of his trial and acquittal; yet, when he undertook to make such publication, it was his duty to give a true statement. That the defendant, in this case, put the plaintiff's acquittal solely on the ground, that *Gibbs*, the only witness who testified against him, stood in the light of an accomplice, when, according to the evidence, it appeared that his credit was otherwise materially impeached. His honor was, therefore, of opinion, that the plaintiff was entitled to recover, though he did not think the *innuendoes* in the plaintiff's declaration were warranted by a true construction of the libel; but that the jury had a right to judge, taking into consideration the whole libel and the evidence, whether it was the intention of the defendant to charge the plaintiff with being guilty of the crime for which he had been indicted. That if they found a verdict for the plaintiff, they ought to give him such damages as, under all circumstances, they should think him entitled to receive. The jury found a verdict for 400 dollars damages.

A motion was made to set aside the verdict, and for a new trial.

Z. R. Shepherd and *Van Vechten*, for the defendant. 1. The admission in evidence of newspapers published after the alleged libel, and subsequent to this action, was improper. *It may be said that they were admitted merely to show the intention or malice of the defendant. But malice or evil intention is the very essence of a libel, and evidence of malice furnishes ground to the jury to enhance the damages. If the subsequent publications prove the malice of the defendant, and aggravated damages are given on account of the supposed malignity of the author, the plaintiff will recover damages also for the subsequent publications, though not libellous.

But, publications since the commencement of the action cannot show the intention of the defendant in publishing the original libel; for the last publication may have been provoked or justified by the subsequent conduct of the plaintiff. Such evidence is irrelevant, and ought not to be admitted to prejudice the defendant. The subsequent publications, if examined, will not justify any inference of malice; and it was improper to permit them to have any influence with the jury, so as to enhance the damages.

Again, the plaintiff must state his complaint specifically, so that the defendant may come prepared to meet it; but how can he be supposed to be prepared to meet subsequent publications not stated in the declaration? In *Mead v. Daubigny*, (*Peake's N. P.* 125. But see *Peake's N. P.* 166. 22.) Lord 200

Ellenborough refused to admit evidence of other words spoken by the defendant, as were in themselves actionable, being clearly of opinion that such evidence was not admissible.

2. The judge misdirected the jury. He should not have left it to them to decide whether the plaintiff, by leaving Congress, had violated his duty. Again, the defendant is not liable to an action for publishing a correct statement of what took place at the trial of the plaintiff; (2 *Burr.* 807. 8 *Term Rep.* 293. 1 *Bos. & Pull.* 525.) and if the substantial fact is justified, the *innuendoes* in the declaration were immaterial. The *innuendoes* are not warranted by the context; the jury ought, therefore, to have been directed to find for the defendant.

The publication was substantially true; its object was to animadvert on the legislature; there was no evidence of malice towards the plaintiff.

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**J. Russell* and *Skinner*, contra. 1. There are numerous decisions which show that other papers, libellous as well as not libellous, published after as well as before the action, may be given in evidence to show the intention of the defendant, or *quo animo* he spoke the words or published the libel; though the jury must give damages only for the libel charged in the plaintiff's declaration. This doctrine was laid down by Lord Kenyon, in *Mead v. Daubigny* (*Peake's N. P. Cases*, 125.) and *Lee v. Huson*, (*Ibid.* 166. See also *Peake*, 22. 75.) and by Lord *Ellenborough*, in *Plunkett v. Cobbett*, (*Selwyn's N. P.* 931.) and *Rustell v. Maquister*, (1 *Campb. N. P.* 49. note.) The evidence is not admitted to increase the damages, but merely to prove the fact of publication, or the intention of the defendant.

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2. To decide whether the judge was correct in stating to the jury that the plaintiff was entitled to recover, the court must determine on what is the true construction of the libel. In the case of *Stiles v. Nokcs*, (7 *East*, 493.) it was held libellous to publish a highly colored account of judicial proceedings, interwoven with the party's own comments, conclusions and insinuations.

If the *innuendoes* are not pertinent or material, they may be rejected as surplusage. (9 *East*, 93.) The truth or falsehood of *innuendoes*, is matter of fact for the consideration of the jury. (3 *Term Rep.* 428.)

SPENCER, J., delivered the opinion of the court. The grounds taken in support of the motion for a new trial, are, 1. That newspapers published after the libel, were admitted in evidence, and without being proved to have been published by the defendant; 2. For the misdirection of the judge; 3. Because the verdict was against evidence.

The papers supposed to have been improperly admitted in
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evidence were two newspapers, entitled "*The Republican Crisis*," of the 16th of *February* and 22d *July*, 1808. The libel was published in a paper of that title of the 2d of *February* 1808, and that paper, it was admitted, was published by the defendant, and it was also admitted that he was the *editor and publisher of that paper from the 20th of *January* to the 1st of *December*, 1808. It was proved by *Reynolds*, a printer, that on comparing the papers of the 16th of *February* and 22d of *July*, with the one containing the libel, they were printed at the same press. This evidence proved the defendant to have been the printer of the two papers objected to, in as full a manner as was necessary. The papers, "*Albany Balance and New-York State Journal*," of the 2d and 13th *June*, 1809, were not objected to, as the case states, for want of proving that they were printed by the defendant.

The question, then, is, Was it proper to give in evidence publications made after the libel? It has not been objected that they were libellous; and the plaintiff's counsel put their right to reading them on the ground that they afforded evidence of the defendant's malice in the original publication. The *nisi prius* decisions on this point are somewhat contradictory. All of them agree that in actions for written or verbal slander, other and posterior publications or words, not actionable, may be given in evidence to show malice. In *Rustell v. Maquister*, (1 *Campb. N. P.* 48. in the notes,) Lord *Ellenborough* said, that although there had been formerly such a distinction, it was not founded on any principle; that any words, as well as any act of the defendant, may be given in evidence to show *quo animo* he spoke the words; but that the judge should tell the jury to give damages only for the words which were the subject of the action.

In *Mead and Daubigny*, (*Peake's N. P.* 126.) and *Cook v. Field*, (3 *Esp. N. P. Cas.* 33.) Lord *Kenyon* refused to permit words actionable, spoken afterwards, to be given in evidence. But in *Lee v. Huson*, (*Peake*, 166.) in an action for a libel, the same judge suffered other libellous papers to be given in evidence.

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Perhaps this is not the occasion to lay down any rule on the subject, it not being necessary to this case, nor do the court mean to do it. But I should think it incorrect to *suffer distinct libellous matter to be given in evidence; for though the judge might instruct the jury not to give damages for such libels, yet it would imperceptibly influence their judgments as to the damages, and thus the defendant might be twice punished for the same offence.

On the point of misdirection, the judge's charge is objected to in three respects; 1. In leaving a question of law to the jury, whether the plaintiff had violated his duty in leaving *Washington* and soliciting the office of treasurer; 2. That the *innuendoes* give a sense not warranted by the context in this,

that the libel did not amount to the charge that the plaintiff was guilty of the crime of receiving a quantity of counterfeit money, with intent to pass the same, knowing it to be counterfeit, and that, on this ground, the judge ought to have charged the jury to find for the defendant; 3. That the defendant's publication of the plaintiff's trial was substantially true; that its object was to animadvert on the legislature, and therefore it ought to have been submitted to the jury whether there was malice in the defendant towards the plaintiff, as evidenced by the libel.

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It must be a matter of fact whether the plaintiff's leaving *Washington* and coming to *Albany*, for the office of treasurer, (if he did so,) was or was not a violation of duty; and this would depend upon the circumstance whether he had leave of Congress to absent himself or not. Unexplained, it is to be presumed that he had such permission. It cannot be pretended that a member of Congress is so far bound to yield his personal attendance, that absence, with leave of the body to which he belongs, is a violation of duty. Congress have a right to enforce the attendance of members, and they have a right to dispense with such attendance. Congress are the judges, and no man is obnoxious to the charge of abandoning his duty there, who leaves it by permission; but this question is at rest by the verdict of the jury.

An *innuendo*, as has been often decided, cannot add or enlarge, extend or change the sense of the previous words; and the matter to which it alludes must always appear from the antecedent parts of the declaration; but when the new matter stated in an *innuendo* is not necessary to support the action, it may be rejected as surplusage. (1 *Chitty*, 383. 9 *East*, 93. *Roberts v. Camden*.)

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The judge admitted the defendant's right to publish a correct account of the plaintiff's trial, but limited this right to the publication of a true history of it; and he stated, that the defendant had put the plaintiff's acquittal solely on the ground, that *Gibbs*, the only witness, stood in the light of an accomplice, when it appeared that his credit was otherwise materially impeached, and that on this ground the plaintiff was entitled to recover.

There is not a *dictum* to be met with in the books, that a man, under the pretence of publishing the proceedings of a court of justice, may discolour and garble the proceedings by his own comments and constructions, so as to effect the purpose of aspersing the characters of those concerned. In the case of *Stiles v. Nokes*, (7 *East*, 493.) the court laid down the true distinction; and whilst they admitted that a fair account of judicial proceedings might be published with impunity, they held that the writer could not introduce his own comments insinuating the commission of perjury. It is impossible to read

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the libel in this case, without understanding that the defendant meant to insinuate that the plaintiff had received the counterfeited money with intent to pass it. But it is said that the animadversion was not on the plaintiff, but on the legislature, for appointing the plaintiff treasurer without investigation. How was the legislature blamable for making the appointment, unless the indictment and trial of the plaintiff, as published by the defendant, held up the plaintiff as probably guilty, notwithstanding his trial and acquittal? If the only witness stated himself to be an accomplice, and was otherwise totally discredited, from the infamy of his character, and his malice towards the plaintiff, (and on these grounds the plaintiff was acquitted,) what investigation was to be made? I am perfectly satisfied that the libel contains a highly colored account of the proceedings, that it suppresses, for bad purposes, material facts, and that it conveys insinuations of the plaintiff's guilt, unauthorized by the trial and the facts which transpired at the time of the trial; and if so, the inference of malice was inevitable.

These remarks have anticipated the last point raised, that the verdict was against evidence. I will only add, that the verdict was, in my opinion, perfectly correct.

Motion denied.

DOUGLAS and another *against* VALENTINE.

In an action of trespass *quare clausum fregit*, brought before a justice's court, the defendant interposed a plea of title, and the same was removed into the Court of Common Pleas, and from thence into this court; and it was held, that under the 7th section of the act, 31st sess. c. 204. the defendant, at the trial, might show a title in himself, or a title in a third person, or a possession out of the plaintiff; and where the defendant in such action proved that he was and had been in possession of the *locus in quo* for more than six years, and the plaintiff never had been in possession; this was held sufficient evidence to entitle the defendant to a verdict. (b)

THIS was an action of trespass *quare clausum fregit*, for breaking and entering the close of the plaintiffs, the 18th day of May, 1809, and the grass there growing treading down, depasturing, ploughing and consuming, and also for beating, bruising and injuring the plaintiff's cattle, and driving and turning them out of the same close, on the 20th May aforesaid. The suit was originally commenced in a justice's court, in the county of Delaware, and the defendant, in pursuance of the statute, (a) interposed a plea of title, for lot No. 2, in the patent of Kortright, being the *locus in quo*, upon which a suit was commenced in the Delaware Court of Common Pleas, and after issue was joined upon such plea,

(a) 2 R. S. 236, 237, sec. 59, et seq.

(b) Vid. *Marsh v. Berry*, 7 Cowen, 344. acc.

the same was removed to this court, by consent of parties, without prejudice, or changing the rights of the parties, as they stood in the court below.

The cause was tried at the *Delaware* circuit, in *June*, 1810, before Mr. Justice *Thompson*.

The defendant, under his plea of title, proved that he was and had been in possession of the premises for upwards of six years. The plaintiffs had never been in possession further than having the key of the house occupied *by a tenant of the defendant, who, on leaving the premises, in *March*, 1809, delivered the key to the plaintiffs.

The defendant also gave in evidence a *lease*, for ever, from *John Kortright*, who was admitted to be the owner of the premises, to *Alexander Sealy*, for the premises in question, and an assignment from *Sealy* to the defendant.

The plaintiffs then gave in evidence an assignment from the defendant to *Lotty Valentine*, dated the 29th *November*, 1809, by which, in consideration of one thousand dollars, the defendant assigned over to her all his right and title to the premises; on condition, that if the said *L. V.* should pay a certain note given by her to the defendant for 1,000 dollars, payable on the 1st *November*, 1807, then the assignment was to be valid, otherwise to be void. The plaintiffs produced an assignment endorsed on the same instrument by *Charles McMullen*, and *Lotty*, his wife, formerly *Lotty Valentine*, to the plaintiffs, dated 14th *January*, 1809. But this assignment being objected to, the judge decided it to be insufficient, unless the plaintiffs showed that the condition of the original assignment had been performed.

The plaintiffs then produced the original note of *Lotty Valentine*, referred to in the condition of the defendant's assignment, with the name torn from it; and proved that she resided in the family of the defendant, on the premises, until her marriage with *McMullen*.

This evidence was objected to as insufficient, but the judge decided that it was sufficient, *prima facie*, to show a performance of the condition. The defendant objected that his possession was adverse to *McMullen*, and that the assignment from *McMullen* and wife to the plaintiffs was, therefore, inoperative; but the judge overruled the objection. The defendant then proved that the plaintiffs were his neighbors; and the witnesses believed that they knew of the condition of the assignment, when they took the assignment from *McMullen* and wife.

**McMullen* had never been in possession of the premises, but had brought an action of ejectment against *Valentine*, to recover the possession, which has been pending about two years; but the judge considered this evidence as insufficient

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to bring home to the plaintiffs a knowledge of the condition of the original assignment.

The defendant then offered to prove that no part of the note for 1,000 dollars had ever been paid; that on the 3d March, 1808, the defendant and *McMullen* agreed that the latter should take up the note for 1,000 dollars, and give his own note to the plaintiffs for 800 dollars, payable the 1st May, 1809, which was then supposed to be the value of the premises; and that the condition of the assignment should be extended to the 800 dollars, instead of the note for 1,000 dollars; that the latter note was accordingly given up, and *McMullen* gave his own note for 800 dollars, which the defendant offered to produce, and show to be wholly unpaid; but there being no proof that the plaintiffs knew these facts, at the time of the assignment to them, the judge rejected the evidence offered, and directed the jury to find a verdict for the plaintiffs for six cents damages, and the jury found a verdict accordingly.

A motion was made to set aside the verdict, and for a new trial, for the misdirection of the judge.

Sherwood and *Sudam*, for the defendant. The plaintiffs were bound to show a possession in themselves, at the time of bringing the action; but the defendant has shown a possession in another. It may, perhaps, be objected, that the defendant cannot set up a possession out of the plaintiffs, (2 *Caines's Rep.* 28.) but the words of the act are clear and explicit: "Provided, nevertheless, that it shall be competent to such defendant, notwithstanding the said plea of title, to show on the trial of any such cause, before any court of common pleas, that the plaintiff had not possession of, or title to, the premises, at the time such *supposed trespass was committed." (31st sess. 'c. 204. s. 7.)† The case of *Strong v. Smith* (2 *Caines's Rep.* 28.) turned on a point of pleading, and not on the construction of the statute, which must be conclusive.

The assignment from the defendant to his daughter was conditional; and whether the condition was precedent or subsequent, it has failed. If it was a precedent condition, no performance was shown; if a subsequent condition, a performance within the time was not proved; so that the estate is at an end. (*Co. Litt.* 216. b. 2 *Bl. Comm.* 157. *Co. Litt.* 218. b. *Cruise's Dig.* tit. 13. c. 2. s. 24.) As the defendant continued in possession, no entry or claim was necessary to defeat the estate. The party was bound to perform the condition literally. No subsequent parol assent or silent acquiescence, can destroy the effect of an express condition in a deed. (1 *Johns. Cas.* 126.)

Again, as the possession of the defendant was *adverse*, the

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conveyance, by *McMullen* and wife, to the plaintiffs was inoperative and void.

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E. Williams, contra. By pleading title, the defendant admits the trespass. It was on this ground that the cause was removed to the Court of Common Pleas. If the trespass is admitted, the possession of the plaintiffs is admitted; and the only question is whether the defendant has a title. The fact of possession is not in issue. This point was expressly decided in *Strong v. Smith*. But the plaintiffs did show a possession. They proved that the tenant, when he left the premises, delivered the key of the house to them.

Again, the conveyance from the defendant was operative. The condition has been performed. The payment of the note was proved by producing it in court cancelled. The only person who could take advantage of a breach of the condition has accepted the payment of the note, and surrendered it to be cancelled. The estate then became absolute in the grantee; and there could be no adverse possession in the defendant.

**Per Curiam*. As this cause came from a justice's court, it was subject to the regulations contained in the act relative to justice's courts. (*Laws*, 31st sess. c. 204. s. 7.) † That act provides, "that it shall be competent to the defendant, notwithstanding his plea of title, to show, on the trial, &c., that the plaintiff had not possession of, or title to, the premises, at the time such supposed trespass was committed." The defendant, then, might have shown three things, either of which would have entitled him to a verdict; viz. title in himself, title in a third person, or possession out of the plaintiffs. The case of *Strong v. Smith* (2 *Caines's Rep.* 28.) never was intended to lay down any proposition contrary to this, nor does it appear to. The decision in that case was, that the plea of the general issue should be struck out, because the fact of the entry upon the close in question, and of treading down the grass, or taking and carrying away the timber, &c., was admitted by the plea interposed before the justice, and brought into the court above. It is there said, that the defendant may show title in himself or a stranger. The case does not happen to say that he may also contravene the possession of the plaintiff, nor does it deny it. The substance of that decision was, that the plaintiff was not to be called upon to prove the trespass or actual commission of the fact; and that the plea of title was *prima facie* evidence of possession, and sufficient to throw it upon the defendant to prove the contrary.

In this case, the defendant proved that he was in possession of the premises, and had been so for upwards of six years, and that the plaintiffs never had any possession, except that a tenant of the defendant delivered them a key of the house in *March*,

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1809. This act of the tenant did not, and could not, in the least, prejudice the possession of the defendant; and, indeed, every attornment of a tenant to a stranger is void. This proof was declared upon the trial not to be sufficient for the defence. *But as it appears to be a right allowed to every such defendant, by the act, to show that the plaintiff had not possession, the defendant showed enough to entitle him to a verdict. Though the parties afterwards went into testimony on the question of title, there was nothing shown to contradict, but the evidence went to confirm the fact, that the plaintiffs never had possession, for they purchased of one *McMullen*, who had never been in possession, but had brought an ejectment against the defendant, and which had been then pending about two years.

On this ground, then, and without reference to the title, the verdict ought to be set aside, and a new trial awarded, with costs to abide the event.

New trial granted.

COLLINS, Widow, &c., against TERRY.

The estate of the mortgagor is the real estate at law, and the widow of the mortgagor may recover her dower out of the land mortgaged; (a) and the tenant deriving title, by mesne conveyance, from the husband of

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the demandant, cannot deny the seisin of the husband, (b) nor can he set up the mortgage as a subsisting title; there having been no foreclosure or entry by the mortgagee. (c) A purchase of the mortgage from the mortgagee is, in effect, a discharge of the mortgage, in favor of the title under the mortgagor.

THIS was an action of dower, *unde nihil habet*. Plea, *non seisin*. At the trial, the marriage of the demandant with her late husband, and his death in *October*, 1805, were admitted. It was proved, that the demandant's husband, during the coverture, was seised, under *Thomas Merrick*, of 200 acres of land, and occupied the same as his own, in 1775, 1776 and 1777; and that the defendant now owns and possesses 40 acres, part of the same land. The plaintiff also produced a deed from *Thomas Merrick* to her late husband, dated *May* 9th, 1775, for the 200 acres of land in fee. Her husband, afterwards, conveyed the same to *Paul Parsons*, *who conveyed the same to *Stephen Winston*, who conveyed the premises to the defendant, with warranty.

The defendant produced a mortgage of the premises, executed by *Merrick*, the 18th *June*, 1772, to *Gilbert Fonda*, for securing the payment of 161*l.* 4*s.* on the 18th *June*, 1777,

(a) Acc. *Coles v. Coles*, 15 *Johns. R.* 319. But where the husband takes a conveyance of land, and at the same time mortgages it to the grantor to secure the purchase-money, the widow cannot claim dower in the premises. *Stow v. Tift*, 15 *Johns. R.* 458. And see *Coates v. Cheever*, 1 *Cowen*, 460. *Jackson v. De Witt*, 6 *Cowen*, 316.

(b) Acc. *Hitchcock v. Carpenter*, 9 *Johns. R.* 344.

(c) *Jackson v. Pratt*, 10 *Johns. R.* 381. But the assignee of a mortgagee in possession of the premises is protected by the mortgage, though no foreclosure of it is shown. *Jackson v. Minkler*, 10 *Johns. R.* 381.

with interest, which mortgage was duly assigned by the executors of *Fonda*, on the 14th *May*, 1801, for the consideration of 200*l.*, to *Ann Winston*, who is the widow and administratrix of *Stephen Winston*. There was an endorsement on the bond of interest paid the 9th *March*, 1784.

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A verdict was taken for the plaintiff, subject to the opinion of the court; and the point raised was, whether the mortgage from *Merrick* to *Fonda* operated to destroy the claim of dower in the premises.

This cause was argued, at the last *August* term, prior to the decision in the case of *Hitchcock v. Harrington*, (6 *Johns. Rep.* 290.)

Huntington, for the demandant. The only question is, whether there was such a seisin of the demandant's husband as will entitle her to dower. In *Bancroft v. White*, (1 *Caines*, 186. 2 *Bac. Abr.* 371. *Dower*, C.) it was held to be sufficient to entitle the demandant to dower, to show that her husband was in possession of the land, and used it as his own; and that the tenant, claiming by a derivative title from the husband of the demandant, was estopped to deny the seisin of the husband.

Again, there was not sufficient proof of the existence of the mortgage, and there was no proof of the execution of the bond. A bond, after 20 years, will be presumed to have been paid, unless there is some endorsement or proof of payment of interest within that time; (1 *Black. Rep.* 532.) and Lord *Mansfield*, in the case of *The Mayor of Hull v. Horner*, (*Cowp.* 109. 1 *Term Rep.* 270. 1 *Burr.* 434.) held, that a jury might presume a bond to have been discharged, where no interest appeared to have been paid for 16 years. In the present case, there was no endorsement within 20 years. The bond is the principal, and the mortgage the accessory. *If the bond is satisfied, the mortgage is extinguished. To render it available, it ought to have been shown that possession accompanied the mortgage.

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The tenant cannot avail himself of the assignment of the mortgage. *Ann Winston* would not be permitted to set up this assignment; neither can the defendant. (4 *Johns. Rep.* 212.) The executors of *Fonda* had no power to make the assignment, which must be considered as void. Where an outstanding title is set up, it must be shown to be an existing and operative title. (3 *Johns. Rep.* 386. 4 *Johns. Rep.* 211.)

But admitting the mortgage to be in force, the demandant, as wife of the mortgagor, is entitled to her dower. A mortgage in fee is considered as a mere pledge or security, and as personal estate. The mortgagor is regarded as the real owner, and the estate passes to his heir. (*Cruise's Dig.* tit. 15. c. 1. s. 13.) Lord *Mansfield* said it was an affront to common sense to say, that the mortgagor was not the real owner of the

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land. (*Doug.* 632.) This doctrine is most fully recognized by the *chief justice* in the case of *Waters v. Stewart*, (1 *Caines's Cas. in Error*, 66, 67. See, also, 4 *Johns. Rep.* 41.) in the Court of Errors. The husband of the demandant must, therefore, be considered as seised, so as to entitle his wife to dower.

Henry, contra. The question is, whether the husband of the demandant was seised of the land, not whether the tenant has a good title. If we can show a good and subsisting title out of the husband, it is sufficient. The defendant is not estopped from proving the existence of the mortgage. We do not deny the right altogether; but merely allege that it was qualified. After the expiration of a lease, the lessee is not estopped to say that the lessor had no title. (4 *Term Rep.* 682. 1 *Term Rep.* 701.)

The doctrine of estoppels is not to be favored. Where there is an estoppel against an estoppel, the matter is at large. (1 *Roll.* 874. l. 50. *Comyn's Dig. Estop.* E. 9.) The demandant claims under a title derived from the mortgagor; she is, therefore, estopped to gainsay the mortgage. (See *Comyn's Estop.* D, C, E. 7. 1 *Roll. Abr.* 868. l. 47. *Co. Litt.* 352. b.)

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*A payment of interest was endorsed on the bond, in March, 1784. The time is to be computed from the day the bond was made payable, which was in June, 1777. When the assignment was made, in 1791, 17 years had not elapsed, and it was treated as an existing and valid bond and mortgage. The administratrix, *Winston*, purchased a subsisting title; but she was not bound to exert it against the tenant to whom the intestate had conveyed with warranty. Why should she purchase the mortgage, if it had been satisfied?

After forfeiture, the estate of the mortgagee becomes absolute at law. The fee is in him. He may maintain ejectment and recover the possession. He must, therefore, have the fee or a term. He has a legal and subsisting title, until the debt is paid. Why may he not maintain a writ of right on such legal seisin? The fee must be either in the mortgagor or mortgagee; it cannot be in both. If, as I contend, the estate is in the mortgagee, after forfeiture, the wife of a mortgagor cannot claim dower on the seisin of her husband. A court of equity, which is disposed to favor widows, will not give dower of an equity of redemption. (*Bro. C. C.* 326.)

H. Bleecker, in reply, observed, that the case of *Bancroft v. White* was in point, and decisive. It has been decided in *England*, it is true, that a widow could not be endowed of an equity of redemption; but the case of *Dixon v. Saville* (2 *P. Wms.* 72.) was in 1783. It was decided, however, by Sir *Joseph Jekyl*, in 1732, in the case of *Banks v. Sutton*, that the widow of a mortgagor in fee, having the equity of redemption,

should be allowed her dower. He considered the wife's right to dower not only a legal but a moral right, and the real estate of her husband as a plank to lay hold of, to prevent her sinking under her distress. All the other cases in which the widow was denied her dower, were those of *trust* estates. A husband may be tenant by the *curtesy* to the estate of a mortgagor; but a tenant in dower, for *the reasons given by Sir *Joseph Jekyl*, is entitled to greater favor.

Our courts have decided, that the mortgagor is the legal owner of the estate. It would be strange to say, that the mortgagor should be considered as seised to every other purpose but that of entitling his wife to her dower.

Per Curiam. This case comes within one of the principles declared in the case of *Hitchcock and wife v. Harrington*, (6 *Johns. Rep.* 290.) The tenant derives his title from, and holds under, the title of the husband of the demandant, as it existed during the coverture, and he, therefore, is not permitted to deny the seisin of the husband. He shows no title under the mortgage; and he cannot, therefore, set it up to defeat the widow's dower. A mortgage, before foreclosure or entry, is not now regarded as a legal title which a stranger can set up. It can only be used by the mortgagee and his representatives. This does, in effect, enable the wife to be endowed of an equity of redemption; and, under the above limitations, it is just and consistent with principle that she should be endowed of it. Why should the mortgagor's interest (when the claim under the mortgage is not interposed) be deemed a legal estate, and yet the widow be excluded from her dower? Lord *Mansfield*, in *Burgess v. Wheate*, (1 *Black. Rep.* 160.) said, that it was not on law and reason, but on practice, that the wife was denied dower, in such a case, and that a wrong determination had too long misled to be altered and set right. It was not, however, until the case of *Dixon v. Saville*, in 1783, (1 *Bro.* 326.) that this point appears to have been put beyond controversy in *England*. We have, in this state, gone greater lengths than the precedents in the *English* books towards a recognition of the mortgagor's estate at law. It is here the subject of sale on execution, as real estate; and on the other hand, the interest of the mortgagee, before entry or foreclosure, is not the subject of such sale. We cannot *now, with any justice or consistency, say that the interest of the mortgagor is the real estate at law, and yet that it is not such estate, when the mortgagor's widow comes to ask her dower of the heir or grantee of her husband. The plain and necessary rule is, to allow her the dower, which she must take, as the heir or purchaser takes the estate, subject to the mortgage.

But in this case, there is another reason why the mortgage cannot be set up to destroy the alleged seisin of the husband.

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The mortgage is not a *subsisting* title, for the mortgagee never entered, and there has been no foreclosure, nor has interest been paid within 20 years. (3 *Johns. Rep.* 386.) The purchase of the mortgage by the administrator of *Winston* from the executors of the mortgagee, was, in effect, a discharge of the mortgage, in favor of the title under the mortgagor. The mortgage is, therefore, to be considered as satisfied and extinguished, and the title of the tenant relates back, and is founded on the seisin of the husband. In no point of view can the mortgage now affect the demandant's claim.

Judgment ought, therefore, to be rendered for the demandant.

WATERMAN against HASKIN.

To a plea of the statute of *usury*, the plaintiff may reply directly, that it was not corruptly agreed in manner and form, &c., without a traverse, and conclude to the country.

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THIS was an action of *assumpsit*. The plaintiff declared on a promissory note made by the defendant, the 1st *October*, 1809, for the sum of 2,483 dollars and 20 cents, payable 60 days after date.

The defendant pleaded, 1. *Non assumpsit*; 2. *Usury*, stating the act; and averred, that at the date of the note, the defendant was indebted to the plaintiff in the sum of 2,410 dollars and 88 cents; and it was then corruptly *agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff 72 dollars and 32 cents for interest, for forbearance of the 2,410 dollars and 88 cents, for sixty days from the 1st *October*, and that, to secure the payment of the 2,410 dollars and 88 cents, and the 72 dollars and 32 cents, the defendant should give his note, &c., and that, in pursuance of such corrupt agreement, the defendant gave the note aforesaid, which the plaintiff accepted; and that the sum of 72 dollars and 32 cents exceeds the lawful interest, whereby the said note is void, &c.

The plaintiff *replied*, that it was not corruptly, and contrary to the intent of the act aforesaid, agreed by and between the plaintiff and defendant, in manner and form as the defendant in his plea alleged, and this he prays may be inquired, &c.

To this replication there was a special demurrer, 1. Because the replication doth not traverse the most material fact in the plea, but takes issue on an immaterial fact; 2. Because the replication traverses a fact which, of itself alone, is immaterial, &c.

Joinder in demurrer.

Champlin, in support of the demurrer, cited 2 *Chitty on Pleadings*, 616. 1 *Lilly's Entries*, 163. *Rich. K. B. Prac.* 148. NEW-YORK, Nov. 1810.

Johnson, contra, cited *Lilly's Entries*, 184. 2 *Rich. K. B. Prac.* 21, 22. 3 *Morgan's Vade Mecum*, 174. 2 *Str.* 871.

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Per Curiam. The replication is in conformity with several precedents in books of some authority. (See 2 *Rich. C. B.* 22. and *Morgan's Precedents*, 174.) It is also agreeable to the doctrine in adjudged cases. In *Baynham v. Matthews*, (2 *Str.* 871.) the court say, that the common form of replying to a plea of the statute *of usury is *non corrupte agreatum fuit, modo et forma*, without a traverse, and with a conclusion to the country. This is precisely the replication in the present case. and in *Fen v. Alston*, cited by Mr. Justice *Denison* in 1 *Burr.* 320. it was held, that the plaintiff had liberty either to reply that the bond was given upon another account, and to traverse the corrupt agreement, with an *absque hoc*, or to deny the corrupt agreement directly, and conclude to the country.

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The replication, therefore, being good, there must be judgment for the plaintiff.

Judgment for the plaintiff.

TILLOTSON against PRESTON.

THIS was an action of trespass *quare clausum fregit*, for entering the plaintiff's close in *Hancock*, in the county of *Delaware*, and cutting and carrying away timber. The cause was tried at the *Delaware* circuit, the 12th of *June*, 1810, before Mr. Justice *Thompson*.

At the trial, the plaintiff proved property and possession of the land, and that divers persons, under and by command of the defendant, entered, and cut and carried away timber, in the years 1805, 1806, and 1807.

The defendant gave in evidence a letter from the plaintiff to the defendant, dated 27th *March*, 1804, in which the plaintiff says, "I will consent to your taking my timber upon the

Where *A.*, the owner of land, wrote a letter dated the 27th of *March*, 1804, to *B.*, saying, "I will consent to your taking my timber upon the terms proposed in your letter, but restricting you to that which has been injured by fire, in the first place, and preferring that you should begin be-

tween *Baxter's* lot and the creek," &c.; and on the 31st of *March*, 1806, he executed a power of attorney to *C.*, with authority to revoke the permission given to *B.*, and which, on the 6th *July*, 1806, was shown to *B.*, who was forbidden to cut any more timber. It was held, that the letter from *A.* to *B.* amounted to a mere license to cut timber, which was revocable; and that *B.* was liable in an action of trespass for all the timber cut by him after notice of the revocation; and that if the letter was founded on any propositions of the defendant, so as to make a contract, so as to justify the trespass, it was incumbent on the defendant to show such propositions. (a)

(a) A license to enter on land is a mere authority, personal to the grantee, and revocable at the will of the grantor. Ex parte *Coburn*, 1 *Cress*, 568.

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terms proposed in yours, &c., but *restricting you to that which has been injured by fire, in the first place; and preferring that you should begin between *Baxter's* lot and the creek, and put this thing under the superintendence of a person in whom you can confide, &c., otherwise I may not know the exact quantity taken off for market, for our joint concern." The defendant then proved that the timber cut was injured by fire, and was situated between *Baxter's* lot and the creek.

The plaintiff then offered in evidence a power of attorney from him to *Ebenezer Foot*, dated the 31st of *March*, 1806, and which contained authority to revoke the power given by the plaintiff to the defendant, and with power of substitution. A power of substitution was executed by *Foot* to *Jonas Lakin*, the 6th *April*, 1806; and the plaintiff proved by *Lakin*, that, on the 6th *July*, 1806, he showed the defendant the power of substitution, and a letter from *Foot*, and forbade the defendant to enter the lot, and that he must cease to act. The defendant said he should not, and did not know *Foot* or *Lakin*. The plaintiff then produced a letter to him from the defendant, dated the 5th of *July*, 1806, in which he acknowledged that *Lakin* had showed him a copy of the power of attorney to *Foot*, and the substitution to *Lakin*, &c. The plaintiff also proved, that, in 1807, timber was cut, under the direction of the defendant.

The defendant produced in evidence an agreement in writing, dated the 1st of *March*, 1806, and signed by him and *F. and J. Wheeler*. The defendant stated himself to act as agent for the plaintiff, and allowed them to cut and carry off the injured timber, &c.

The plaintiff abandoned any claim for damages, except for one raft cut by *F. and J. Wheeler*, in 1807, and notice of the revocation. The judge thought that the contract in the plaintiff's letter was irrevocable, but advised a verdict, subject to the opinion of the court. A verdict *was accordingly taken for the plaintiff for 45 dollars, damages.

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Sudam, for the plaintiff. 1. The letter from the plaintiff to the defendant was a mere license or authority to enter on the land for a certain purpose. It was to be exercised for the benefit of both parties. It will be said that the defendant had an interest in the land, which could not be divested. But admitting it to be a contract, it is void under the 11th section of the act for the prevention of frauds. The letter of the plaintiff is not a sufficient memorandum within the statute. It does not contain any of the terms of an agreement of sale. (2 *Bos. & Pull.* 238.) It is void for uncertainty. It is such an agreement as could never be enforced. (*Prec. in Ch.* 560. 1 *Atk.* 12. 6 *Bro. P. C.* 45. 1 *Str.* 426. 1 *P. Wms.* 618.)

The sale of growing timber is an interest in land within the

4th section of the statute of 29 Car. II. c. 3. corresponding with the 11th section of our act. (6 East. 502. 24th sess. c. 44.) (a) But the language of the parties clearly shows, that the defendant was a mere agent, and was to execute a trust for the benefit of the plaintiff. His power was revocable.

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Van Vechten, Attorney General, and *Sherwood*, contra. The letter of the plaintiff to the defendant was an agreement, and, as such, irrevocable. If it was defective in any respect, it might be supplied by other proof at the trial. Admitting, however, that it was a power, yet it was a power coupled with an interest, and could not be revoked. The defendant had acted under this power, and had entered into a contract with the *Wheelers*, by virtue of that authority; and it cannot be revoked to the prejudice of this contract. The defendant was to sell the timber for the joint benefit of the plaintiff and himself. As the extent of the interest of each party does not appear, it must be presumed to be equal; and that the profits arising from the sale of the timber were to be equally divided between them. The power was to continue until the timber, which was the subject matter, was sold and converted into money.

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The defendant does not attempt to enforce a contract against the plaintiff. He merely offers it as a defence against the charge of being a trespasser. He is not bound, therefore, to show the precise terms of the contract. If the plaintiff has any other paper or evidence to show that the defendant was a trespasser, he ought to produce it. The defendant has shown enough, *prima facie*, to support his defence.

Again, it is admitted that the timber sold prior to 1807 was within the authority given to the defendant; but the timber taken in 1807 was under the contract in 1806, which was made in execution of the power. The revocation could not extend to contracts previously made under the power.

Again, there was not legal notice to the defendant of the revocation. The power given to *Foot* was not, of itself, a revocation of the power to the defendant. The revocation ought to have been communicated to the defendant in a more authentic manner.

If the letter contains the terms of the agreement, or refers to another paper which contains the terms, it is sufficient. Lord *Thurlow*, in the case of *Tawney v. Crowther*, (1 Bro. C. C. 319.) was of opinion, that if a letter refers so clearly to an agreement as to show what was meant by the parties, where the existence of the paper is proved by parol, it will take the case out of the statute.

E. Williams, in reply. The case of *Crosby v. Wadsworth*

(a) 2 R. S. 134. sec 6

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(6 *East*, 602. 1 *Comyn on Contracts*, 79.) shows that a sale of growing timber is within the statute of frauds, it being an interest in or concerning the land. If the defendant relies on a contract as a justification, it is incumbent on him to produce such contract; and if there was another letter or paper in the possession of the plaintiff, which was material to show *a complete and valid contract, he ought to have given notice to the plaintiff to produce it at the trial, or have filed a bill of discovery against him. If the contract, as proved at the trial, is essentially defective, and is so vague and uncertain that it could not be enforced, it cannot constitute a valid defence in this action. It cannot be good for one purpose, and bad for another.

This was, in truth, a mere agency on the part of the defendant, who was to dispose of the timber which had fallen, or been injured by fire. In regard to him, the power was always executory and revocable. The language of his letter to the plaintiff, written after the power given to *Foot*, and read at the trial, shows that he considered himself as transacting the business of the plaintiff, and as having an agency or trust. If the authority given to the defendant was revocable, then the power given by the defendant to *F. & J. Wheeler* to take timber must also be revocable. Where an authority is by parol, and a new attorney is appointed, the new power is, *ipso facto*, a revocation of the former authority.

Per Curiam. The plaintiff brings trespass for cutting and carrying away timber, in the year 1807; and he shows title, possession, and the trespass committed by direction of the defendant, to the amount of the damages recovered. The cause then turns upon the justification set up by the defendant. The trespass being proved, it lies with the defendant to make out his defence. To do this, he produces a letter written to him by the plaintiff in 1804, in which the plaintiff consents to his taking timber upon the terms proposed in a letter of the defendant. To meet the justification set up under this letter, the plaintiff shows a revocation of this permission, duly notified to the defendant, in the summer of 1806, and to which he refuses to conform, but causes the timber in question to be subsequently cut. This *act of the plaintiff, in 1806, does away the force of the permission in 1804, for that letter could not certainly be considered as a permission that was to endure for ever. If the letter was founded upon any proposition of the defendant, so as to form a contract which would justify the trespass, it certainly lay with the defendant, and not with the plaintiff, to show that fact, for it constituted an essential part of the defence. The defendant might have called for the letter; and if the plaintiff did not produce it, he might have proved its contents. It certainly lay with him to make out his

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justification, and the plaintiff's letter does not of itself do it, when connected with the subsequent revocation of his consent. It would be extravagant and alarming to consider the permission in that letter as being, of itself, and without further proof, irrevocable, and that the defendant might go on without bound or limit. The plaintiff is, therefore, entitled to judgment.

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Judgment for the plaintiff.

JACKSON, *ex dem.* GILBERT, against WOOD.

THIS was an action of ejectment, brought to recover part of lot No. 16, in the town of *Junius*, in *Seneca* county, and was tried at the *Seneca* circuit, in *June*, 1810.

The plaintiff produced an exemplification of *letters patent*, issued the 29th day of *January*, 1791, from the people of the state of *New-York*, giving, granting and confirming unto Lieutenant *Hongost Tewahengriahaken*, an *Oneida Indian*, as a bounty for his services during the revolutionary war, the lot in question, "to have and to *hold the above described and granted premises, unto the said *Hongost Tewahengriahaken*, his heirs and assigns, as a good and indefeasible estate of inheritance, for ever." It was then proved that the patentee was dead; and that after his death, on the 2d day of *April*, 1808, his two sons and heirs, *Hongost* and *David*, sold the premises in question to the lessor of the plaintiff, and gave him a deed accordingly, which was duly proved and recorded.

The defendant objected to the plaintiff's recovering, on the ground, that the above heirs (being *Oneida Indians* and residing with the *Oneida* tribe) were *aliens*; and therefore could not take by descent, which objection was overruled. But the judge decided, that a deed from the Indian heirs was not valid in this case, on the ground that Indians are prohibited by law from selling their lands; and the plaintiff was nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

Cady, for plaintiff. The 37th article of the constitution, (b) for the purpose of preserving peace and amity with the Indians within the state, declares, that no sales or purchases from them

Where a patent for a lot of land was granted in 1791, to an *Oneida Indian*, as a bounty for his services, as a soldier, during the revolutionary war, "to hold unto him

[* 291] and his heirs and assigns for ever," and the patentee died, leaving two sons, his heirs, who sold and conveyed the land to A. It was held, that the sale and conveyance were void. *Indians*, residing in the state of *New-York*, cannot, according to the constitution and laws of the state, alienate their lands, without the consent of the legislature, or the approbation of the surveyor-general.

(a)

(a) Vid. *Jackson v. Sharp*, 14 Johns. R. 472. *Jackson v. Brown*, 15 Johns. R. 264. *St. Regis Indians v. Drum*, 19 Johns. R. 127. *Jackson v. Goodell*, 20 Johns. R. 183. S.C. in error, 20 Johns. R. 693. *Lee v. Glover*, 8 Cowen, 189. See also *Johnson's Lessee v. McIntosh*, 8 Wheat. 543. *Chandler v. Edson*, 9 Johns. R. 362.

(b) Art. 7. sec. 12. of the Constitution of 1821.

NEW-YORK, shall be valid, unless made under the authority, and with the consent of the legislature.

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† 1 R. S. 719.
sec. 11, 12.
‡ 3 R. S. 350.

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The act passed the 18th *March*, 1788, (*Greenleaf's* edit. vol. 2. p. 194.) 11th sess. c. 85.† is founded on the constitution, and merely adds a penalty for any violation of the constitution in this respect. The act of the 4th *April*, 1801, among the revised laws, 24th sess. c. 147.‡ merely follows the constitutional prohibition, and adds a penalty. It does not enlarge or extend that prohibition. The framers of the constitution could never have had in view a sale by an individual Indian, who was a free holder. The preamble to the article clearly shows that they contemplated the Indians as tribes or nations, with whom it was necessary to preserve peace, for the *safety and tranquillity of the state. The acts of the legislature relate only to public lands. There is nothing in the constitution, or the acts of the legislature, fairly construed, that incapacitates an Indian, who is a freeholder, from alienating his lands.

§ 1 R. S. 719.
sec. 10.

By the act concerning tenures, (10th sess. c. 36. s. 1.§) it is declared lawful for every freeholder to alienate or dispose of his lands or tenements, at his pleasure. The legislature have allowed Indians to become freeholders; and by issuing patents of lands to them, their heirs and assigns, they are, by the very terms of such patents, authorized to sell and dispose of the lands granted to them.

The unrestrained power of alienation is an inseparable incident to an estate in fee simple; and when an estate once becomes assignable, it for ever continues assignable. By granting an estate of inheritance, or fee simple, to this Indian, the legislature have given him the power to sell.

|| 1 R. S. 719.
sec. 9.

It cannot be objected, that the Indians are aliens, for by the act of the 28th *February*, 1789, (12th sess. c. 42.|| *Greenleaf's* edit. *Laws*, vol. 2. p. 279.) lands held by any inhabitant or citizen of the state, since the 7th *January*, 1770, cannot be defeated by any pretence of alienism; nor can any plea or pretence of alienism be objected, as to lands acquired between the 3d *September*, 1783, and the time of passing that act. Though the patent was issued in this case in 1791, it can make no difference, as all lands to which soldiers who have died were entitled, are declared to have been vested in them in 1783.

The legislature, by their act, 22d sess. c. 13. granted lands to *John Dennie*, an Indian, and took a mortgage from him.

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Gold, contra. 1. Indians cannot take lands by descent. No descent can be cast, but on persons who owe allegiance. If a *denizen* in *England* purchased lands, to *him and his heirs, yet his heirs could not inherit. (7 *Co. 6*, 7. *Calvin's* case.) Nor is it, as *Lord Coke* observes, climate or soil that makes a natu-
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re. born subject, but *allegiance* and *obedience*; for if any enemy within the kingdom have possession of a town or fort, and have issue born, such issue is no subject of the king, though born on the soil, for he is not born under his allegiance and protection.

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The treaty of peace between the *United States* and *Great Britain*, which allowed *British* subjects to hold lands, did not permit them to descend; and this defect was afterwards supplied by the treaty of 1794.

"Citizens," says *Vattel*, (*Vattel*, b. 1. c. 19. s. 212.) "are the members of civil society; bound to this society by certain duties, and subject to its authority, they equally participate in its advantages." Are these Indians citizens or subjects of this state? Do they owe allegiance or obedience? Can the state compel them to bear arms, to pay taxes, or to perform any other duties of a citizen?

Again, how are these lands to descend? According to the law of descents established by this state, or according to the customs and usages of the Indian tribe?

From the well known condition of the Indians, they are presumed to be wholly ignorant of our laws; they are *inopes consilii*, and considered as wholly incapable of contracting. If the tribes or nations, acting in their collective capacity, are considered as incapable of selling their land, without the consent of the legislature, *à fortiori*, an individual must be regarded as incompetent.

The act of the 4th April, 1801, (24th sess. c. 147.) (a) speaks of purchases made of any *Indian* or *Indians*; thereby clearly intending to prohibit purchases from an individual as well as from a tribe.

Because an Indian is a freeholder, it does not follow that he has a right to convey. *Infants*, *femes covert*, or persons *non compos mentis*, may be freeholders; yet they are incapable of conveying their lands while under such legal disability. The right of transmitting property *by descent is not derived from the law of nature, but from the positive and arbitrary laws of civil society, (*Cruise's Dig. Descent*, tit. 29. c. 2. s. 2.) which are variously modified in different states, according to principles of public policy or convenience. The act of the 28th February, 1789, was not prospective; it referred only to past cases.

In the 21st section of the act of the 4th April, 1801,† the lands of the *Brothertown Indians* are made descendible to their heirs, according to our law of descents; and the widow of a deceased Indian is declared entitled to remain in the house of her husband, during her widowhood; and the superintendents are to assign her as much land as they may think necessary; which is wholly dif-

† 3 R. S. 353
sec. 21.

(a) Vid. act 10 April, 1813, sess. 36. c. 29. 3 R. S. 350.

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ferent from the law of dower as to our citizens. But these benefits and privileges are not extended to any other tribe of Indians. As to other Indians, no person can purchase or take lands from them, without the consent of the legislature.

Cady, in reply. The case mentioned from *Coke* is that of the issue of an alien enemy. But Indians born in our country, and who have fought the battles of our revolution, stand on a different ground.

An *African* brought into this country and sold as a slave, if he is afterwards manumitted, becomes entitled to all the rights and privileges of a native citizen, and may hold and transmit lands. Is an Indian possessed of less understanding than an *African*? On what principle of justice or reason should they be considered less competent, or less entitled to hold and transfer property?

If an Indian patentee can convey, why may not his children, who take by descent, also convey?

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KENT, Ch. J., delivered the opinion of the court. It is stated in the case, that the heirs of the Indian patentee, under whom the lessor of the plaintiff claims, by a deed of the 2d of April, 1808, are *Oneida Indians*, and residing *with the *Oneida* tribe. The plaintiff shows the deed without proving the consideration, or showing any particular legislative sanction for the conveyance, and the question is, whether the deed be valid in law.

It is a fact too notorious to admit of discussion or to require proof, that the *Oneida Indians* still reside within this state, as a distinct and independent tribe, and upon lands which they have never alienated, but hold and enjoy as the original proprietors of the soil. Their political relation to this state is peculiar, and *sui generis*. If they are not *aliens* in every sense, because of their dependence as a tribe, and their right to protection, they cannot be considered as subjects born under allegiance, and bound, in the common law sense of the term, to all its duties. But this is a question which I do not wish or mean to discuss, and I have only alluded to the condition of the *Oneidas*, to show that they come within the general provision in our constitution and laws, relative to purchases of land from the *Indians* within this state.

† Const. art.
7. § 12.

The 37th article of the constitution† declares that no purchase or contract for the sale of lands which may be made with or by the Indians within this state shall be valid, unless made under the authority and with the consent of the legislature.

This provision has been generally supposed, and perhaps correctly, to refer to purchases from the Indians, as a tribe or community; for Indians generally hold their lands in common, and do not know of individual property in land. But the
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legislature, in their earliest provision on the subject of these Indian purchases, carry their prohibition to all purchases from *individual* Indians, as well as from the tribe; for the act of the 11th sess. c. 85. (a) declares it to be a public offence to purchase or contract for the sale of lands within this state, *with any Indian or Indians* residing within the limits of this state. The same prohibition, in the same words, was included *in the revised laws of 1801; (*Laws*, vol. 1. p. 464.) and the act of 1801 goes further, and declares, (sect. 2.) (b) that no person shall maintain an action on any contract, against any *Stockbridge or Brothertown Indian*, or against any Indian residing on any lands reserved to the *Oneida, Onondaga or Cayuga Indians*. If no suit will lie against the Indian himself on such contract, it is because the law will not recognize it as valid, unless made under the sanction which has since been provided. It is difficult to reconcile this provision in the act, with the validity of the deed before us. The various regulations in the act of 1801, all show the sense of the legislature, that an Indian, in his individual capacity, is, in a great degree, *inops consilii*, and unfit to make contracts, unless with the consent and under the protection of a civil magistrate. The law not only protects Indians from any suit upon their contracts, but it declares specially, that all alienations of land by the *Brothertown and New-Stockbridge Indians* are void. These are just and humane guards against the imposition and frauds which that unfortunate people have not the power to withstand.

The same provisions prevail in the *Spanish* colonies. None of the Indians within the *Spanish* dominions can dispose of their real property, without the intervention of a magistrate. But the act of the 32d sess. c. 63.† relates to the very subject before us. It provides that the heirs of Indians, to whom lands have been granted by this state, for military services, shall be, and are made capable of taking and holding any such lands by descent, in the same manner as if such heirs were citizens of this state, at the death of their ancestors; and that every conveyance, thereafter to be executed by such patentee, or his heirs, to any citizen of this state, for any such land, shall be valid, if executed with the approbation of the surveyor-general. The act of the next, or 33d sess. c. 25. contains directions for the surveyor-general, calculated to secure the more effectually, justice *to the patentee and his heirs; and there is a proviso in each of these acts, that nothing in them shall be construed to conform or affect any prior conveyance from such patentee or his heirs. Such conveyances remain as if those acts had not been passed; and from the construction which I give to the prior acts of the 11th session, and of 1801, such contracts and conveyances, if executed by *Indians residing with their tribe*, were absolutely void.

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† 1 R. S. 720.
sect. 13.

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(a) 1 R. S. 719. s. 11, 12.

(b) Vid. Act of 1813, sect. 2. 3 R. S. 350.

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The case is within the letter, and certainly within the spirit, of the several statutes on this subject. These statutes ought to be construed liberally for this purpose. The principles of public policy, a sense of justice and humanity, the honor of the state, and the conclusions of law, require us to consider such contracts as made with persons unfit to contract without the advice of disinterested counsel. I allude now only to contracts made with individual Indians, and not to purchases made from the tribe, in their national or collective capacity. The nation, by its chiefs in council, is to be presumed competent to judge of its rights, and to preserve them; and private purchases from the nation or tribe are declared void upon other grounds.

The motion on the part of the plaintiff to set aside the nonsuit is, therefore, denied.

Judgment of nonsuit.

[* 298] *Cox against The Trustees of PEARCE, an absconding Debtor.

A deposition taken before the trustees appointed under the act for relief against absconding and absent debtors, may be read in evidence before referees, nominated under the same act, after the death of the witness, though taken by the referees, in the absence of the creditors, or *ex parte*, the trustees being considered as the agents of both parties.

The court may inquire into the merits of the controversy, on the report of the referees; but it will require a strong case to induce them to set aside the report.

RUSSELL, in behalf of the creditor, moved to set aside the report of the referees, nominated under the 16th section of the "act for relief against absconding and absent debtors:" (24th sess. c. 49.) (a)

1. Because they had admitted improper evidence.

2. On the merits, as against evidence.

The referees admitted the deposition of *Joseph Sears*, taken before them in *August*, 1809, and who was dead at the time it was offered to be read in evidence, at the hearing, in *December*, 1809.

Russell read several affidavits to show that the report of the referees was against evidence, but it is unnecessary to detail the facts.

Foot and Schoonhoven, contra, contended that this reference being voluntary, though under the statute, the court could not set aside the report, unless for corruption or misbehavior of the referees.

The Court. We will hear the case on both points.

Russell cited *Peake's Evid.* 62. 3 *Term Rep.* 707. 5 *Term Rep.* 373. 1 *M'Nally on Evid.* 283. 300. *King v. Woodcock*, and *King v. Dingley*, 1 *East*, 373. 2 *East*, 54. 63.

(a) 2 *R. S.* 45. sec. 19, *et seq.*

He observed that the deposition of *Sears* was *ex parte*; *Cox* and none of the creditors being present. He objected also, that the report was signed by two of the referees only.

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Foot and *Schoonhoven* insisted that the deposition was taken by the trustees, who are the agents of both *parties, under the statute; that every examination taken and authorized by law, whether the party against whom it is to operate be present or not, is competent evidence, in case the witness dies. (2 *Str.* 920.) Thus examinations taken on a coroner's inquest are allowed to be read in evidence, if the witnesses are dead. So the *ex parte* deposition of the mother of a bastard child, in regard to its putative father, is admitted in evidence; these examinations being authorized by statute.

Again, this being a reference under the statute, a report by two of the referees is sufficient.

Per Curiam. The deposition of *Joseph Sears* was taken on the 16th August, 1809; and when it was offered to be read before the referees, in December, 1809, he was dead. This deposition was taken by the trustees, when *Sears* was examined by them on the claim of *Cox*, and the statute says, (*Laws*, vol. 1. p. 240.†) "that the trustees, or any two of them, are competent to settle all matters and accounts between the debtor and his creditors, and to examine any person on oath concerning the same, which oath may be administered by any of the said trustees, two of them being present." In this examination, the trustees act as the official agents of both parties, and under obligations, official and religious, to act impartially. A deposition taken before them, when they were examining the witnesses, ought to be read afterwards, upon the death of the witness, as much as a deposition taken before a coroner's inquest, or the *Onondaga* commissioners, and it ought equally to be admitted. (2 *Johns. Rep.* 20.)

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† Vid. 2 R.
S. 43. sec. 12,
13.

On the merits of the case, there is not sufficient ground to interfere with the determination of the referees. The referees are stated to have been appointed in pursuance of the act, which is perfectly fair and impartial between the creditor and the trustees. The act says, that the referees "shall finally settle the *controversy." And though the court may look into the merits of the controversy, without any objection to the behavior of the referees, yet they certainly will require a pretty strong case before they interfere and set aside the decision. From the testimony of *Sears* and of *Clows*, there is no doubt but that the demand of *Cox* was properly rejected, and though the credit of *Clows* was attacked, it was also defended, and it was still a question for the referees how far his credit was destroyed; and if it had been, there was nothing to touch the

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credit of *Sears*. The motion to set aside the report ought to be denied.

SPENCER, J., not having heard the argument, gave no opinion.

Motion denied.

JACKSON, *ex dem.* KELLY and OAKLEY, *against*
BELKNAP.

Where, on application of a defendant in ejectment, a demise is ordered to be struck out of the plaintiff's declaration, he must serve a certified copy of the rule for the amendment, on the plaintiff,

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which shall be deemed an actual amendment, as to all subsequent proceedings on the part of the plaintiff; and the defendant, without a new copy of the declaration being served on him, must enter into the consent rule, and plead in 20 days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule shall be sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, whenever it may become necessary. (a)

AT the last *August* term, on the application of the defendant, one of the demises in the plaintiff's declaration was ordered to be struck out. No notice or copy of the rule was served on the plaintiff; nor was any new declaration delivered by him; but the cause was noticed for trial at the last *Orange* circuit, under the title, according to the amendment directed by the court. At the trial, the plaintiff was nonsuited, for not confessing lease, entry and *ouster*.

**Fisk*, for the defendant, now moved to set aside the default. He contended that one of the demises having been struck out, a copy of the amended declaration ought to have been served by the plaintiff. He cited 2 *Caines*, 26. *Anonymous*; and *Holmes v. Lansing*, 1 *Johns. Cases*, 248. Where the declaration is amended after plea, the defendant is entitled to an imparlance, and may plead *de novo*.

Caines, contra. The 8th rule of *April* term, 1796, applies only to amendments made by a plaintiff; and all the decisions under that rule relate to amendments made by plaintiffs, not to those made by defendants. Amendments are granted on payment of costs. The defendant applied to strike out the demise, and he might have gone to the clerk's office and struck out the count. At least, the defendant ought to have entered a rule for the amendment, and served a copy on the plaintiff's attorney, or have given him notice of it.

Per Curiam. The practice to be pursued when a rule for an amendment of this kind is obtained, seems not to be well settled. The defendant, in the case before us, has interposed no affidavit of merits. The practice being unsettled, if he has any defence, he ought to be let in. We think, therefore, that the proceedings must be stayed until the next term, to give him an opportunity of presenting such an affidavit, if any can

(a) Vid. *Jackson v. Stiles*, 5 *Cowen*, 418.

be made. But in cases hereafter arising, the practice we adopt is, that the defendant must serve on the plaintiff a certified copy of the rule, which shall be deemed an actual amendment of the declaration, as to all subsequent proceedings on the part of the plaintiff; and the defendant, without being entitled to a new copy of the declaration, must enter into the consent rule, and plead within 20 days after service of a certified copy of the rule for amendment, unless otherwise ordered by the court. *This rule shall be deemed sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, if it shall at any time become necessary.

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Motion granted.

SHOTWELL against FEW.

THIS was an action of *trover*, for machinery, tools, wrought and unwrought materials, belonging to the plaintiff, a block-maker.

The cause was tried at the *New-York sittings*, the 11th of *December*, 1809, before Mr. Justice *Yates*.

In 1805, the plaintiff sent the tools and machinery and materials, with an overseer, to the state-prison, to employ the prisoners to work in making blocks, pursuant to an agreement made between the plaintiff and the inspectors of the prison. The defendant was one of the inspectors.

The articles were proved to be the property of the plaintiff.

John Cooke, a witness for the plaintiff, testified, that at the trial of a former suit brought by the plaintiff against *Peter H. Wendover*, the agent of the prison, to recover the same articles, the present defendant was a witness, and testified that the articles in question had been detained by his own personal order, and not as an act of the board of inspectors, and the plaintiff on that trial was nonsuited.

A demand was made of the articles at the prison, of the clerk, in the absence of the agent, and it was answered, that the articles were detained by order of the inspectors, on account of a debt due from the plaintiff.

**Wendover*, the agent, testified, that he understood from the defendant, that he had, as one of the inspectors, directed the clerk not to deliver the articles to the plaintiff when they were demanded; and that the goods were detained by order of the inspectors, and that the defendant gave the order as inspector; but no entry of such order appeared to have been made in the minutes of the board of inspectors. The witness said, that in

Where the goods of *A.*, in the custody of the agent of the state-prison, were refused to be delivered on the demand of *A.*, by the direction and command of *B.*, one of the inspectors, it was held that *B.* was liable to an action of *trover* for the goods so detained by his authority. (a)

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(a) Vid. *Bristol v. Burt*, et not. supra, 254.

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regard to matters of minor importance, he observed the directions of a single inspector; but that in regard to the delivery of the articles in question, he should not have obeyed the directions of a single inspector. The agreement between the plaintiff and the inspectors was verbal. The plaintiff was to furnish the raw materials, and allow 40 cents per day for the labor of each convict, for which a credit was to be given; and that when the articles were demanded, there was about 500 dollars due from the plaintiff to the prison.

A motion was made for a nonsuit, and the judge was of opinion, that the property came into the prison under a contract between the plaintiff and the inspectors, and that one inspector could not order it to be delivered; that the plaintiff ought to have sought his remedy on the contract, or against the proper parties. The plaintiff then offered to proceed for the tools and machinery detained; but the judge, being of opinion that they also were within the contract, directed the plaintiff to be called, and he was nonsuited.

A motion was made to set aside the nonsuit, and for a new trial.

Hopkins, for the plaintiff. Here was no right of *lien*, in this case, on the part of the inspectors. *Liens* are allowed in regard to certain trades, or certain officers or agents, where the work is done not solely on the credit of the employer. General *liens* are for the convenience of trade, and, being founded on custom only, are taken *strictly. Particular *liens* have been allowed, in regard to particular trades only, and are not to be extended. The courts in *England* have unwillingly extended the doctrine in one or two instances.

But where there is a special agreement, there can be no right to retain. (*Buller*, 45. *Sayer*, 224.) And, especially, where a *credit* is given, there can be no *lien*; for it expressly excludes the idea that the party looks to the property as his security.

Where goods come into the hands of a person by contract, and are detained by wrong, trover will lie; and in tort or trespass, he who commands the tort or trespass to be committed, is liable as the principal *tortfeasor*. Here the goods were detained by the authority and command of the defendant.

Admitting that the materials might be detained, the plaintiff has, unquestionably, a right to his tools and machinery. There can be no pretence on the part of the defendant for detaining them.

Cowdry and *Sandford*, contra. 1. The contract under which the plaintiff sent the articles to the state-prison, was made by the inspectors as a body, and not with the defendant. The goods were never in the private possession of the defendant, who, as an individual, had no control over them. The

inspectors cannot be made liable in their individual capacity. The institution, by the act of the 3d *April*, 1801, (24th sess. c. 121.) is placed under the management and control of the inspectors, who must be liable, in effect, as a corporation, for the acts of the board of inspectors. But by the 12th section of a subsequent act, passed 10th *April*, 1805, (28th sess. c. 135.) all contracts and dealings with the institution are to be transacted in the name of the agent, and by the name of agent of the state-prison, &c., he and his successors in office are made capable of suing and being sued, in *all matters and causes concerning the prison. This action, therefore, will not lie against the defendant.

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2. But there is no evidence of a conversion by the defendant. No actual conversion is pretended. A constructive conversion arises from a demand and refusal. No demand was ever made of the defendant; nor was there any refusal on his part. The defendant had no legal right or authority to deliver the goods, unless there had been an order of the board of inspectors to that effect. If, then, he could not lawfully comply with a demand, his refusal would be lawful, and so no evidence of a conversion. A mere non-delivery of goods is not a conversion. (4 *Esp. Cases*, 157.) A demand must be made on the party or his authorized agent. *Wendover* was the agent of the institution, not of any single inspector. But the demand was never made of the agent, but only of the clerk of the agent. The plaintiff must prove that the goods came to the possession of the defendant; or, if delivered to his servant, that they came to his possession in the course of business. (2 *Ld. Raym.* 92. *Bull. N. P.* 44.)

The proper remedy is on the contract. Where there is an omission to deliver, it not being in the power of the party to deliver, the action should be on the contract. (5 *Burr.* 2825.)

Hopkins, in reply. The plaintiff did bring his action against the agent, and, on the evidence of the present defendant, he was nonsuited. He could not sue the inspectors, for they are not responsible as a corporation; but if they were a corporation, they have done no corporate act to render them liable. Besides, the statute speaks only of contracts; it has no reference to *torts*. The institution, *quasi* a corporation, have committed no *tort*.

The only remedy, therefore, left to the plaintiff, was a suit against the defendant, by whose authority and *command the goods were detained, and who is liable as a *tortfeasor*.

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Per Curiam. The defendant exercised *authority* and *dominion*, in the detention of the goods; and the detention of them must be considered as his act. He clearly had no right to detain, or direct the clerk to detain, the tools and machinery;

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MERCER
v.
SAYRE.

Motion granted.

MERCER *against* SAYRE, impleaded with TOLER.

Where the counsel for the defendant, after he had summed up the evidence in the cause, and while the plaintiff's counsel were addressing the jury, discovered new and material evidence, which he offered to produce; but the judge, supposing he had no discretion, refused to admit it, unless the plaintiff's counsel would consent, which being refused, a verdict was found for the plaintiff; it was

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held, that the judge had a discretion to admit the evidence; and that, as it ought to have been received, the defendant was entitled to a new trial. (a)

THIS was an action of *assumpsit*. The *capias ad respondendum* was returnable the 10th of August, 1807. The declaration contained seven counts. The first count was on a promissory note, dated the 14th February, 1806, for 164 dollars and 44 cents, payable six months after date. The other counts were for goods sold, &c., the usual money counts, and an *insimul computassent*. The defendant pleaded *non assumpsit*, and payment, with notice of a set-off.

The cause was tried at the *New-York sittings*, the 13th of December, 1809, before Mr. Justice Yates. It is unnecessary to state all the facts proved at the trial.

After the evidence was closed, and after the defendant's counsel had summed up to the jury, and while the plaintiff's counsel were addressing the jury, the counsel for the defendant informed the judge, that he had just discovered, from the inspection of a paper in the possession of one of the plaintiff's witnesses, who had been examined, that the money due on a note of *Thomas Burdell*, for 3,000 dollars, and which the plaintiff contended *comprehended the sum due for the goods of the plaintiff sold by *Sayre* and *Toler*, and for which the present suit was brought, was not, in fact, received by the assignees of *Sayre* and *Toler*, until December, 1807, after the commencement of the suit; and asked permission to give the paper, or evidence of that fact, to the jury; but the judge thought he could not admit the evidence, unless the plaintiff's counsel would consent; which being refused, the evidence was rejected, and the jury found a verdict for the plaintiff, for 742 dollars and 77 cents, being the balance due on the account of the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

Baldwin, for the defendants. The evidence offered was material; for the suit was brought in August, 1807, to recover the balance of a consignment of goods from the plaintiff to the defendants, and for which they took the note of *Burdell*; and the money, as would have been proved, was not received by the defendants until long after the commencement of the suit,

(a) Acc. *Jackson v. Tallmadge*, 4 Cowen, 450.

so that the plaintiff had no cause of action, at the time the suit was brought.

The judge had a discretion to admit the evidence, under the peculiar circumstances of the case. It was decided, in *Byron v. Alexander*, (2 Johns. Cas. 318.) that the judge had such a discretion in a similar case. And it is on the ground of a refusal of the judge to exercise that discretion, that we apply for a new trial.

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v.
HOGEBOOM.

D. B. Ogden, contra. It was not necessary for the plaintiff to show that the money had actually come into the hands of the defendants, in order to maintain his action for money had and received. (*Doug.* 132. 2 *Esp. Cases*, 571.) The defendants, having assigned the note for a valuable consideration, were immediately liable for the amount to the plaintiff. It was so much money received to his use. Whether the assignee received the money before or after the commencement of the suit, cannot affect the plaintiff's right of action. The evidence, therefore, if admitted, would not have prevented a recovery.

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Per Curiam. The evidence offered was material, inasmuch as it went to destroy any presumption that the money was actually received by the defendant at the time the action was brought. The judge, under the circumstances of the case, had a discretion to admit the evidence; and it ought, in sound discretion, to have been received. We think, therefore, that the defendants are entitled to a new trial, with costs to abide the event of the suit.

Motion granted.

WENDOVER and HINTON *against* HOGEBOOM and others

THIS was an action of *assumpsit*, for sails, &c., furnished by the plaintiffs, who are sailmakers, on the 6th December, 1806, for a vessel called the *Convention*, owned by the defendants. The sails were furnished by the plaintiffs, on the order of *A. Vosburgh*, the master. The ordinary term of credit was three months. It appeared from the custom-house books, that the defendants were owners of the vessel in 1804, and there was

A regular bill of sale is not essential to transfer the property in a vessel, but the same passes by delivery, like any other chattel. (a)

The law of the United States, requiring the re-

gister to be inserted in the bill of sale, on every transfer of a vessel, affects only its character and privileges as an American vessel. (b)

(a) Acc. *Leonard v. Huntington*, 15 Johns. R. 298. *Thorn v. Hicks*, 7 Cowen, 697. And see *M'Intire v. Scott*, 8 Johns. R. 159. But see *The San Jose Indiano*, 2 Gallis, 268.

(b) Vid. *Sharp v. United Ins. Co.* 14 Johns. R. 201. *Watson v. Penniman*, 1 Mason, 306

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no change of the register, or any record of a transfer of the property by them, until in the autumn of 1807.

Vosburgh purchased the vessel of the defendants, in 1805, and the vessel was delivered to him previous to the sale of the sails, by the plaintiffs. By an agreement between the defendants and *Vosburgh*, at the time of the sale of the vessel to him, the purchase-money was to be *paid in instalments, at different periods, and a formal bill of sale was not to be executed and delivered until the payments were completed; but the vessel was to be delivered immediately to *Vosburgh*; and was, in fact, delivered to him, at the time of the sale, for his sole and exclusive benefit, and he afterwards kept possession, and received all the freight and earnings of the vessel, to his own use. The consideration-money was afterwards paid, according to the agreement; but the bill of sale was not executed until in the autumn of 1807, when *Vosburgh*, having sold the vessel to one *Gibbs*, applied to the defendants, and obtained a regular bill of sale from them to him; and he executed another bill of sale to *Gibbs*.

It appeared that the plaintiff sold the sails on a credit of 9 months; and after the expiration of the time, frequently applied to *Vosburgh* for payment, prior to bringing the present action. *Vosburgh* represented the vessel as his own, and obtained an extension of credit, on stating his inability to pay in a shorter time.

Under the direction of the judge, a verdict was found for the defendants.

A motion was made to set aside the verdict, and for a new trial.

J. T. Irving, for the plaintiff, contended, that, as no bill of sale was to be executed until the money was paid, it was not intended that the property should pass, until the payment. If the property was to revert in case of the non-payment at the time stipulated, then it cannot be said, that it was transferred by the delivery. As a vessel, if sold without a regular bill of sale, reciting the register, loses the privilege of an *American* vessel, in regard to duties, it is not to be presumed that *Vosburgh* could consent to purchase without a bill of sale. It was a mere contract for a future sale. He said, that the case *of *Murgatroyd v. Crawford* (3 Dallas, 491.) was in point.

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Van Buren and *T. A. Emmet* insisted, that there was a complete transfer of the property, by the contract and delivery; that a bill of sale is not essential, by the law of the *United States*, to the transfer of the property in the vessel, but the same passes by delivery. The law merely requires the register to be inserted in the bill of sale, in order to entitle the vessel to the privileges of an *American* ship; but this law applies only to registered vessels. Coasting or licensed vessels pass by de-

livery, like any other chattel; and the *Convention* was a coasting vessel. There was an absolute sale and delivery in this case.

But admitting the defendants were owners, there is sufficient evidence to show that the credit was given exclusively to *Vosburgh*; (1 *Stra.* 816. 1 *Term Rep.* 108.) and it was necessary for the plaintiff to prove, that *Vosburgh* was the agent of the defendants; that the relationship of master and owners subsisted between them; (8 *East*, 10.) or that he had authority to bind them.

The case of *Murgatroyd v. Crawford* was, afterwards, overruled, in the case of *Duncanson v. McClure*, (4 *Dallas*, 314.) and in *Murgatroyd v. McClure*, (4 *Dallas*, 342.) which related to the same ship.

Per Curiam. The defendants are not liable. The property in the vessel was not in the defendants, when the plaintiffs sold the sails to the master. They had ceased to be owners. The credit was given to the master. The motion must, therefore be denied.

Motion denied.

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SCHEMER-
HORN
v.
LOINES.

*SCHEMERHORN and others *against* LOINES and others.

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THIS was an action of *assumpsit*, brought to recover the price of certain articles of ship chandlery, supplied by the plaintiffs, as ship chandlers, in *May*, 1806, for the ship *Eleanor*. The cause was tried before Mr. Justice Yates, at the *New-York* sittings, in *December*, 1809.

The goods were furnished by the plaintiffs for the use of the ship, between the 16th and 27th *May*, 1806, and were delivered to *Benjamin Lord*, the master, and one of the defendants. The articles were ordered, for the use of the ship, by *George Townsend*, since deceased. The articles were charged in the books of the plaintiffs to the debit of the "ship *Eleanor*, Mr. *George Townsend* and owners." No time of payment was mentioned, but the usual credit on such goods is six months. The defendants, *Richard Loines*, *James Loines* and *Benjamin Lord*, and *George Townsend*, were the owners of the ship, at the time the articles were supplied by the plaintiffs.

Where a person supplied stores to a ship, of which there were several owners, on the order of one of them, who acted as ship's husband, and took his note in payment, and gave a receipt in full, it was held to be no discharge of the other owners, especially, as it did not appear that the plaintiff knew, at the time, that there were other owners. (a)

(a) For the circumstances under which the acceptance of negotiable paper, on account of a prior debt, will be deemed an extinguishment of the original claim, see *Cumming v. Hackley*, 8 *Johns. R.* 202. *Putnam v. Lewis*, *Id.* 369. *Johnson v. Weed*, 9 *Johns. R.* 310. *Witherby v. Mann*, 11 *Johns. R.* 518. *Arnold v. Camp*, 12 *Johns. R.* 409. *Burdick v. Green*, 15 *Johns. R.* 241. *Porter v. Talcott*, 1 *Cowen*, 359. *Raymond v. Merchant*, 3 *Cowen*, 147. *Reis v. Barber*, 3 *Cowen*, 272. *Woodcock v. Bennet*, 1 *Cowen*, 711. *Hughes v. Wheeler*, 8 *Cowen*, 71. *New-York State Bank v. Fletcher*, 5 *Wendell*, 85. *Olcott v. Rathbone*, 5 *Wendell*, 490. *Jones v. Savage*, 6 *Wendell*, 658. *Van Ostrand v. Reed*, 1 *Wendell*, 424. *Clark v. Pinney*, 6 *Cowen*, 291.

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SCHWEN-
HORR
v.
LOINES.

The plaintiffs, on the 20th *October*, 1806, took from *George Townsend*, who was the ship's husband, his promissory note, payable in 90 days, for the amount of the account, and gave him the following receipt. "*New-York, October 20, 1806, received of Mr. George Townsend his note of this date at ninety days, for two hundred and thirty-two dollars thirty-two cents, in full for supplies of ship Eleanor.*"

Townsend died the 2d *December*, 1806, and continued to pay his notes until the time of his death; but his estate afterwards proved to be insolvent. The clerk of the plaintiffs testified, that when he delivered the goods, and when the note was taken from *Townsend*, and the receipt given, he did not know that either of the present defendants was owner or interested in the ship, and *that he did not believe that the plaintiffs had any knowledge of that fact, at that time; but were referred to the defendants as part owners, by the administrator of *Townsend*, some time after his decease. It was proved that the ship *Eleanor*, in *May* 16, 1806, was advertised in the gazette, for *Liverpool*, for freight or passage, and application was requested to be made to Capt. *Lord*, on board, or to *J. & R. Loines*, or to *George Townsend*; and this gazette was regularly taken at the store of the plaintiffs, during the year 1806; but it was not proved that either of the plaintiffs had actually seen or read the advertisement.

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A verdict was taken for the plaintiffs, by consent, subject to the opinion of the court, on a case in which the above facts were stated.

S. Jones, jun., for the plaintiffs. The defendants were owners of the ship at the time the supplies were furnished, and must be liable, unless the plaintiffs have done some act to discharge them.

The taking the note of *Townsend*, who was a part owner and ship's husband, and giving him a receipt in full, is no payment or discharge of the original debt. (*Tobey v. Barber*, 5 *Johns. Rep.* 68.)

The giving a further credit of 90 days, beyond the usual term, can have no other effect than to enlarge the time of payment, as it respects the parties liable in the first instance. The plaintiffs have shown, as far as it was possible, that when they took the note, they did not know that there were other owners.

Wells, contra. The original liability of the defendants, as part owners of the vessel, is not denied; but we contend that the plaintiffs, by their own act, have discharged them. The entry in the books of the plaintiffs shows that they were aware of there being other owners; and the advertisement and public notoriety of the fact, repels any inference of want of knowledge on their part.

If they did not mean to look to *Townsend* alone, why *did they not inquire of him, at the time, as to the other owners? The plaintiffs took the note in full payment for the goods; and meaning to take the risk of its payment. The extension of the term of credit also shows this intention. If this had been the note of a stranger or third person, it would be considered as giving a new credit, and a discharge of the original debtors; and *Townsend*, in this transaction, may be considered as a third person. Again, the rights of the defendants are affected by the credit given to *Townsend*; for if they had been called on for payment at the end of the six months, *Townsend* would have paid his proportion; but the loss, as it respects him, has been occasioned by the act of the plaintiffs.

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V.
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Jones, in reply, observed, that in *Reed v. White* and others, (5 *Esp. Cas.* 122.) a *nisi prius* case, before Lord *Ellenborough* and a special jury, it was decided that if a person supplies stores to a ship owned by several persons, and takes in payment the bill of the ship's husband and part owner, and settles with him alone, and afterwards renews the bill, he discharges the other owners; but in that case the other owners, being ignorant of the dealings between the plaintiff and the ship's husband, had suffered him to receive large sums of money as freight, which they would otherwise have detained; and the renewal of the bill showed clearly the intention of the plaintiff to adopt him as the single debtor.

Per Curiam. The defendants were liable as owners, and the plaintiffs have done nothing to discharge them. The taking of the note of *Townsend*, and giving a receipt in full, is no extinguishment of the original debt, unless the note was paid. There is no evidence that the plaintiffs *knew* that the other defendants were part owners. The case of *Reed v. White* proceeds on the ground that the plaintiff had taken the ship's husband *exclusively for his debtor, knowing there were other owners, and after a settlement of accounts between them and the ship's husband.

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The plaintiffs are entitled to judgment.

Judgment for the plaintiffs. (a)

(a) See the case of *Muldon v. Whitlock*, 1 *Coven*, 290. which was in all respects similar to the present, and was similarly decided.

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Nov. 1810.

THE PEOPLE
v.
HUMPHREY.

THE PEOPLE *against* HUMPHREY.

In prosecutions for *bigamy*, the mere confession of the party is not sufficient evidence of the first marriage; but there must be proof of a marriage in fact. (a)

THE prisoner was indicted and tried, at the last Oyer and Terminer in *Ulster* county, for *bigamy*.

The marriage of the defendant with *A. S.* on the 1st of *August* last, was duly proved. It was also proved that a short time afterwards, a person calling herself *Elizabeth Humphrey*, and the wife of the prisoner, appeared before a justice of the peace, and charged him with the offence of *bigamy*. On his examination before the magistrate, the prisoner voluntarily acknowledged that *Elizabeth*, who was then present, was his wife, and that they had been married about four years before. The counsel for the prisoner objected, that the evidence of the confession of the prisoner of his first marriage was not sufficient proof of a marriage in fact; but the objection was overruled, and the prisoner was convicted. The judgment having been suspended, he was now brought up on *habeas corpus*; and the question raised for the consideration of the court was, whether the prisoner could be convicted of *bigamy*, on his own confession out of court, without any other evidence whatever of a marriage in fact.

Sudam, for the prisoner. He cited 1 *East's P. C.* 470.

Hopkins, contra.

Per Curiam. In *Morris v. Miller*, (4 *Burr.* 2056.) Lord *Mansfield* held, that in prosecutions for *bigamy*, as well as in actions *for *crim. con.* a marriage in fact must be proved; and the same rule was recognized in *Birt v. Barlow*, (*Doug.* 171.) The mere confession of the party is not sufficient evidence. The prisoner must be discharged.

Prisoner discharged.

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(a) Vid. *Fenton v. Reed*, 4 *Johns. R.* 52.

NEW-YORK
Nov. 1810.JOHNSTON
v.
COL. INS. CO.JOHNSTON *against* THE COLUMBIAN INSURANCE
COMPANY.

THIS was an action on an open policy of insurance on cargo, from *New-York* to *Martinique*. The policy was dated the 25th of *May*, 1807. The plaintiff abandoned on the 5th *October*, 1807, for a total loss, by perils of the sea. The declaration, besides a count on the policy for a total loss, contained the usual money counts. The defendants pleaded the general issue, and paid into court 1,400 dollars, under the common rule, upon the whole declaration.

The cause was tried at the *New-York* sittings, in *April*, 1810, before Mr. Justice *Spencer*.

The vessel sailed on the voyage with a cargo belonging to different shippers, besides the plaintiff. The preliminary proofs which were admitted were a *protest* made at *Martinique*, an invoice of the cargo belonging to the plaintiff, who was the master of the vessel, together with the original bills of parcels for the goods, mentioned in the invoice; a survey of the goods, at *Martinique*, and an authenticated account of the sales at auction of the goods described in the invoice, being seven boxes of muslins; all of which were exhibited at the trial. From the survey, &c., it appeared that the goods were damaged by sea-water, and the damage was estimated at 25 *per cent.*; and they were sold at public auction, for whom it might concern, by order of the "tribunal of the first instance," at *Martinique*.

**John Ferrers*, a witness for the plaintiff, testified, that he is agent for the defendants, for the purpose of stating and adjusting claims against them for losses; and that the papers exhibited as preliminary proofs, with others, were submitted to him for the purpose of estimating the loss; and that he made a calculation according to the survey of 25 *per cent.* loss on the original invoice, and delivered his estimate with the papers to the defendants; and that the statement was made for the purpose of ascertaining the amount to be brought into court; and the money accordingly paid into court was a little more, in order to cover any miscalculation.

Under the direction of the judge, a verdict was found for the plaintiff for a total loss; the amount to be ascertained by persons appointed by the court.

Where the preliminary proofs of interest and loss on a policy of insurance were submitted by the insurers to their agent, who stated the amount of loss; which was accordingly paid into court; it was held that the act of the agent of the insurers admitted the sufficiency of the proofs, in the first instance. (a) Payment of money into court admits the cause of action as stated in the plaintiff's declaration. (b)

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(a) What preliminary proofs are sufficient, and by whom and how they may be waived. *Barker v. Phoenix Ins. Co.* 8 Johns. R. 307. *Vose v. Robinson*, 9 Johns. R. 192. *Luxence v. Ocean Ins. Co.* 11 Johns. R. 241. *Francis v. Ocean Ins. Co.* 6 Cowen, 404. S. C. in error, 2 *Wendell*, 64. See also as to preliminary proofs in fire insurance, *Daves v. North River Ins. Co.* 7 Cowen, 462. *Norton v. Rens. and Saratoga Ins. Co.* 7 Cowen, 645.

(b) *Vid. Spaulding v. Vandercook*, 2 *Wendell*, 431.

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Nov. 1810.
JOHNSTON
V.
COL. INS. CO.

Wells, for the plaintiff, contended, that the preliminary proofs of interest and loss were sufficient. The protest, *survey*, and other papers were referred by the defendants to Mr. *Ferrers*, their agent, for his examination and opinion, and he must have ascertained the interest of the plaintiff, the loss, and the amount of that loss. The defendants adopted the result of this inquiry. They have adopted the acts of their agent, and must be bound by them. They have admitted that the plaintiff had an insurable interest to the amount subscribed to the policy, and that there was a loss by the perils of the sea.

Again, a payment of money into court, generally, on all the counts in the declaration, is an admission of the cause of action, as stated in the declaration, and the only question is as to the amount of damages. He cited 5 *Burr.* 2640. 1 *Term Rep.* 464. 2 *Term Rep.* 275. 4 *Term Rep.* 579. 2 *East*, 128. 2 *Bos. & Pull.* 550. 1 *Campbell's N. P.* 557. *Peake's Law of Fo.* 202, 203. (215.)

[* 317] *C. I. Bogert* and *S. Jones*, junior, contra. The only evidence of the interest is the invoice and bills of parcels. *There is no proof that the goods were actually shipped.

Again, there is no evidence as to the cause of the damage ; whether in consequence of bad stowage or not ; whether the goods were damaged before they were shipped, or by being put on deck. The *survey* merely states that there was a loss of at least 25 *per cent.* ; and there is no evidence of a greater loss. Strict proof is required of a technical total loss. A sale at auction is not a criterion of the damage.

If the plaintiff relies on the adjustment of Mr. *Ferrers*, he must be concluded by it, and cannot claim beyond the amount stated. But an adjustment is not conclusive. (*Herbert v. Champion*, 1 *Campb. N. P.* 134.)

As to the effect of paying money into court, the *English* courts appear to have gone as far as to say that it admits the cause of action ; but distinguished men in *England* have thought otherwise. Lord Ch. J. *Eyre*, in the case of *Gutteridge v. Smith*, (2 *H. Black.* 374.) held, that after the payment of money into court, there might be a nonsuit, judgment as in case of a nonsuit, demurrer to evidence, a plea *puis darrein continuance*, in short, that the cause goes on substantially in the same manner as if no money had been paid at all. In *Rucker and another, v. Pulsgrave*, (1 *Campb. N. P.* 557. 1 *Taunton's Rep.* 419.) Sir James *Mansfield* said he remembered the time when paying money into court was not an admission of any thing. Payment of money into court, as for a partial loss, does not admit a total loss. The true rule undoubtedly is, that the effect of a payment into court is only to strike so much out of the declaration ; it admits only that the plaintiff is entitled to the amount paid into court ; but if he claims more, he must proceed and prove every thing precisely in the

same manner as if no money had been paid in. Our courts have not adopted the rule contended for by the other side, and are at liberty to lay down such a rule as may be reasonable and convenient.

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v.
GILLET.

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**Hoffman*, in reply, observed, that the preliminary proofs were amply sufficient, and were supported by the evidence at the trial. The goods were necessarily sold at auction, according to the mode of proceeding at *Martinique*. It is the universal practice to sell damaged goods at auction, for the benefit of whoever it may concern. It is the constant practice in the port of *New-York* for the wardens to sell at auction all goods which are damaged to the amount of five *per cent*.

Unless objected to at the time, the acts of Mr. *Ferrers*, the agent of the defendants, are conclusive. (1 *Caines*, 444.)

Per Curiam. The proof of interest and loss were sufficient, in the first instance, to entitle the plaintiff to recover. This is admitted by the act of the agent of the defendants, which is binding on them; and the payment of the money into court was an admission of the cause of action, as alleged in the declaration. The plaintiff is, therefore, entitled to judgment.

Judgment for the plaintiff.

DAVIS *against* GILLET and another.

THIS was a suit on a recognizance of bail, taken in a cause, in the Court of Common Pleas of *Rensselaer* county.

A motion was made to set aside the proceedings, on the ground, that the suit ought to have been brought in the Court of Common Pleas, where the original suit was carried on. (6 *Term Rep.* 365.)

The bail had removed out of the county of *Rensselaer* into another county.

Where bail in a court of common pleas remove out of the county, an action on the recognizance may be brought in this court. (a)

Per Curiam. The act for the relief of special bail, (24 sess. c. 186.) (b) requires the *scire facias* on recognizance *against bail to be served personally, unless the party shall have removed out of the state. As the bail had removed from the county of *Rensselaer*, he could not be sued in the Common Pleas. The suit must, therefore, of necessity, be brought in this court.

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Motion denied.

(a) Vid. *Harwell v. Bates*, 9 *Johns. R.* 80. *Gardiner v. Durham*, 12 *Johns. R.* 459. *Burtus v. M^cCarty*, 13 *Johns. R.* 424.

(b) 2 *R. S.* 383. sec. 35. *Id.* 580. sec. 23.

NEW-YORK,
Nov. 1810.

RICHARDS
v.
BROWN.

RICHMOND *against* ROBERTS.

Where a gaoler discharged a defendant in execution, on his executing to him a bond, with a warrant of attorney, for the amount of the debt, and additional charges, the court set aside the judgment entered up on the bond and the warrant of attorney, and left the party to seek his remedy by an action on the bond, so that the defendant might avail himself of any defence at law. (a)

Whether such a bond, taken by a sheriff or gaoler, is not against the statute, as taken for ease and favor, and by color of office? *Quære.*

THE defendant in this cause was taken on a *ca. sa.* by the sheriff of Columbia, at the suit of *Alexander Pope*, and committed to the custody of the plaintiff as gaoler. The plaintiff took a bond, payable in ten days, and a warrant of attorney to confess judgment thereon, for the amount of the *ca. sa.*, together with 10 dollars, for additional costs and charges of the plaintiff. At the end of the ten days, judgment was confessed and entered up on the bond. A motion was now made to set aside the judgment and warrant of attorney.

Per Curiam. The judgment and warrant of attorney must be set aside. To tolerate a practice, for a sheriff or gaoler to take a *judgment bond* from a prisoner charged in execution, for the amount of the execution, and such other charges as the sheriff or gaoler may think proper to demand, would lead to the greatest abuse and oppression. Such bonds, at least, ought to be open to every inquiry and defence at law. We are inclined to think, that such bonds are against the statute, as being taken for *ease* and *favor*, and by *color of office*; but on this point we do not mean to give an opinion, or to conclude the party; but merely set aside the judgment and warrant of attorney, and leave the plaintiff, if he pleases, to prosecute the bond at law.

Motion granted.

(a) *Vid. Love v. Palmer, et not. supra, 159.*

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*RICHARDS *against* BROWN.

Where any difficulty arises in making up a *feigned issue*, ordered by the court, it must be settled before a judge at his chambers.

THE counsel for the parties not agreeing, on making up a feigned issue, directed in the cause, at the last term, a question arose, whether it was to be settled by the court, or a judge at his chambers.

Tallmadge, for the plaintiff.

Munro, contra.

Per Curiam. If any difficulty arises between the parties, as to the feigned issue, it must be settled before a judge or commissioner.

NEW-YORK
Nov. 1810.PARKER *against* ROOT.PARKER
v.
ROOT.

THE defendant moved for judgment, as in case of nonsuit, for not bringing the cause to trial at the last *Albany* circuit.

Sherwood, contra, read an affidavit, stating, that the attorneys had entered into a *parol* agreement to change the *venue* in the cause; which was the reason that it was not brought on to trial, pursuant to the notice.

The court will not take notice of a *parol* agreement between attorneys, even as to bringing on a cause to trial at the circuit. (a)

Per Curiam. We cannot take notice of *parol* agreements of attorneys, even with respect to bringing a cause to trial at the circuit. The motion is granted; but with leave to stipulate on payment of the costs of this application.

(a) *Griswold v. Lawrence*, 1 Johns. R. 507. *Contra*, in the Court of Errors. *Chambers v. Fitch*, 2 Cowe., 743.

END OF NOVEMBER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN FEBRUARY TERM, 1811, IN THE THIRTY-FIFTH YEAR OF OUR
INDEPENDENCE.

* * On the first day of February, MATTHIAS B. HILDRETH, Esq. was appointed attorney general, in the place of ABRAHAM VAN VECHTEN, Esq.

JEROME against WHITNEY.

A note to pay sixty dollars, in neat cattle, is not a note within the statute, and the consideration must be stated and shown. But the words "value received," in such a note, is *prima facie* evidence of a consideration, and sufficient to cast

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on the defendant, the burden of proving that there was no consideration. But if the plaintiff, in his declaration on such

a note, instead of stating generally that it was given for value received, sets forth specially in what the value received consisted, he is bound to prove the particular value according to the averment, and the general acknowledgment of value in the note is not sufficient to support the declaration. (a)

THIS was an action of *assumpsit*. The declaration contained two counts. 1. For that whereas the defendant, on the 9th November, 1803, at, &c., in consideration that the plaintiff would then and there sell and convey to the defendant, a certain piece or parcel of land, situate, &c., made a certain instrument or note in writing, subscribed, &c., bearing date the same day and year aforesaid, and delivered the same instrument in writing to the plaintiff, and thereby, for value received, promised to pay the plaintiff sixty dollars with interest, to be paid in neat cattle, in one year from the date, at cash price, &c., and the plaintiff averred, that he did then and there *sell and convey to the defendant, a certain lot or piece of land, situate, &c., by virtue whereof, and by force of the statute in such case made and provided, the defendant became liable to pay, &c., and being so liable, did, afterwards, on, &c., at, &c.,

(a) Vid. *Saxton v. Johnson*, 10 Johns. R. 418. *Walrad v. Petrie*, 4 Wendell, 575. *Hughes v. Wheeler*, 8 Cowen, 77. *Douglass v. Wilkeson*, 6 Wendell, 637

undertake and promise, &c. 2. The second count was for money had and received to the use of the plaintiff. The defendant pleaded *non assumpsit*.

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v.
WHITNEY

The cause was tried at the *Onondaga* circuit, on the 9th *June*, 1810, before the *chief justice*.

The plaintiff gave in evidence a note, as follows: "For value received, I promise to pay *Chauncey Jerome*, sixty dollars, with interest, to be paid in neat cattle, in one year from this date, at cash price. Witness my hand at *Aurelius*, November 9, 1808. *Jonathan Whitney*." The counsel for the defendant moved for a nonsuit, unless the plaintiff proved the consideration set forth in his declaration, and the averment, as to the same consideration, there stated; but the objection was overruled by the *chief justice*, who decided, that the words "value received," in the note, were *prima facie* evidence of the consideration, and cast the burden of proof on the defendants to disprove it; and, thereupon, the jury, under his direction, found a verdict for the plaintiff, for 84 dollars and 45 cents.

Rodman, for the defendant. I rely on the case of *Lansing v. M'Killip*, (3 *Caines's Rep.* 206.) It was there decided, after a consideration of all the cases, that where two good considerations are stated in a written contract, both must be proved as laid, though the promise express to be for "value received." The doctrine is laid down in *Hughes v. Hughes*, (7 *Term Rep.* 350. note a. 1 *Comyn on Contracts*, 10 to 13. *Chitty on Bills*, 12. 62.) that a parol promise, though in writing, is not valid, unless the consideration be proved. The words "value received" do not, of themselves, import a consideration, but it must be averred and proved.

**Cady*, contra. In *Jackson, ex dem. Hudson, v. Alexander*, (3 *Johns. Rep.* 484.) the court decided, that the words "value received," in a deed, imported a sufficient consideration; and the *chief justice*, in taking notice of the case of *Lansing v. M'Killip*, observed, that it was determined on the ground, that the words "value received" imported a consideration; though two of the judges intimated an opinion, that they did not dispense with the necessity of averring and proving a consideration. If, then, these words import a sufficient consideration in a deed, there is no good reason why they should not have the same effect in a simple contract.

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Again, the plaintiff was entitled to offer the note in evidence, under the money count. (2 *Johns. Rep.* 235.) This gets rid of the objection, as to the necessity of proving the special consideration laid in the first count.

Per Curiam. This is not a promissory note under the statute, for it is payable in "neat cattle," and it therefore re-
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quired a consideration to be stated, either by showing the acknowledgment of one upon the face of the note, or otherwise by particularly averring it, as in a declaration upon a special agreement. The note is expressed to be given for *value received*, and the question is, whether that is not evidence, *prima facie*, of a consideration. Whatever might have been the true import of the decision in *Lansing v. M'Killip*, (3 *Caines*, 286.) in respect to this question, is not now very material, for since the case of *Jackson v. Alexander*, (3 *Johns. Rep.* 484.) the court cannot consistently say, that the acknowledgment of value received is not evidence of consideration in a note, as well as in a deed. It is sufficient to cast upon the defendant the burden of proving that there was no consideration. This rule is reasonable and convenient. Notes payable in specific chattels are very common, and to compel the plaintiffs, in every instance, notwithstanding the note is expressed to **be* for value received, to prove the true and identical consideration at large, is imposing upon him a great and unnecessary hardship. The confession of value by the maker of the note ought to be sufficient in the first instance.

Had the plaintiff, in this case, declared upon the note, stating it to have been given for value received, and had not set forth a special and particular consideration, the production and proof of the note would have been sufficient to have put the defendant upon his defence. But having specified in what that value consisted, he was bound to prove the averment as laid. A particular value charged was materially different from value in general; and so it was lately held, in *England*, in *Knill v. Williams*, (10 *East*, 431.) On this ground the verdict must be set aside for misdirection, and a new trial awarded, with costs to abide the event; but the plaintiff is at liberty to amend his declaration, by striking out the special consideration set forth.

New trial granted.

ALBANY,
Feb. 1811.KETLETAS
v.
FLEET.KETLETAS *against* FLEET.

THIS was an action on the case, to recover the price of a negro boy sold by the plaintiff to the defendant. *The cause was tried at the *New-York* sittings, in *May*, 1808, before Mr. Justice *Van Ness*.

The plea was the general issue, with notice that the defendant would give in evidence that the plaintiff, on the 1st of *March*, 1804, agreed and promised to make the boy free in eight years, from the 8th of *April*, 1804, and that, at the time of the sale, he had no right to transfer the boy for a longer period than eight years; and that, as soon as the deception, in selling the boy for life, was discovered, the boy was returned to the plaintiff, and the contract of sale rescinded.

At the trial, the plaintiff proved the sale as stated in 1806, for the price of 250 dollars, and the delivery of the negro to the defendant; and that the negro was for some time afterwards in the employment of the defendant.

The defendant offered in evidence a writing, under the hand and seal of the plaintiff, dated the 1st of *March*, 1804, stating that he did promise and agree to give his boy *Tom* free in eight years, from the 1st day of *April*, 1804, upon condition that *Tom* conducted himself as an industrious, honest and faithful servant, during that period. This writing was objected to, but admitted and proved. It was also proved, that the negro left it in the hands of a third person, for safe keeping. The defence was, that the defendant had no knowledge of this contract, and that it was fraudulently concealed from him. The plaintiff objected to this defence, but it was admitted. The defendant proved, that eight or ten days after the sale, he went to the house of the plaintiff to deliver back the negro, on account of that contract, and to pay wages for the time he had the boy. The fact of this tender was admitted by the plaintiff. It was further proved, on the part of the defendant, that he was informed of the existence of the writing by the person with whom it had been deposited, about eight or ten days after the sale, and that the plaintiff had applied for *the instrument, stating that the boy was sold, and that the instrument was of no consequence.

The owner of
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a slave gave a written promise to manumit such slave, in eight years, on condition of his faithful service during that period; this was held to be a conditional manumission, obligatory on the master, and of which the slave might avail himself, on the performance of the condition. (a)

After giving such a written covenant, which was delivered to the custody of a third person, the master sold the slave, absolutely, for his full value; and the vendee, though he was informed, at the time of the sale, that the slave had been promised his freedom in eight years, yet did not know of the written covenant until after the sale, when he returned the slave to the vendor, and rescinded the contract; in an action brought by the vendor to recover the purchase-money, it

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was held that the vendee being ignorant of

the existence of the written covenant, at the time of the sale, the concealment was a fraud, and vacated the contract.

If a man sells a different interest from that which he pretends, and especially if the contract is founded in ignorance and fraud, the purchaser of the chattel may return it to the vendor, if he does so immediately after the discovery of the imposition, and thereby rescind the contract.

(a) What will amount to a manumission? It seems that it cannot be by parol. *Wells v. Lane*, 9 Johns. R. 144. *Mattor of New Michel*, 14 Johns. R. 394. *Petry v. Christy*, 19 Johns. R. 52. *Trengott v. Byars*, 5 Cowen, 488. But see *Smith v. Hoff*, 1 Cowen, 127.

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The plaintiff, on the other hand, proved that the defendant, before the sale, said to the boy that he must be a good boy, as the plaintiff had agreed to liberate him at the expiration of eight years. The plaintiff and defendant lived near each other. The defendant said, the day before the sale, that if he bought the boy, he wanted him for life, and he would not make any promise to liberate him, as the plaintiff had done. The defendant lived in the family of the plaintiff at the time the contract with the boy was executed; and the contract was frequently talked of in the family, and well known to them all.

The plaintiff further offered to prove that the negro had broken the condition in the contract, but this evidence was rejected.

The defendant then proved that 250 dollars was the full value of the slave, and that he bought the boy as a slave.

The plaintiff proved that the defendant admitted that he knew, before the sale, that the plaintiff had engaged to manumit the boy at the expiration of eight years; but that he did not know of the writing.

The judge charged the jury, that if the defendant knew that the plaintiff had agreed to give the boy free in eight years, yet if he did not know of the writing, they ought to find for the defendant; and the jury found accordingly.

A motion was made for a new trial, on the following grounds:—

1. That the writing was not obligatory.

2. That, as the sale had been carried into execution, the defendant could not set off the pretended fraud against the price.

3. That the defendant had notice of the contract at or before the sale.

*4. That the plaintiff ought to have been permitted to show the condition broken.

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P. W. Radcliff, for the plaintiff. 1. The paper given by the plaintiff, and relied on by the defendant, was a mere declaration of intention, and not obligatory on the plaintiff. It does not purport to be a contract or agreement with the slave, or any other person.

Admitting that it was an agreement in form; yet, being made with a slave, a person incapable of contracting, it was void. To make a valid agreement, there must be two parties capable of contracting, and a fit subject of contract. There must be mutuality; but what can a slave do or give, to support the mutuality of an agreement? To render it valid, the contract should have been made with a third person, for the benefit of the slave.

2. Suppose it to have been a valid agreement; yet it was conditional, and the plaintiff ought to have been permitted to

prove a breach of the condition. A slave is not more entitled to the benefit of a conditional promise, without performing the condition, than a freeman.

3. Allowing the agreement to be in force, the defendant had sufficient notice of it, before he made the purchase. If the contract was void, no notice was necessary, as it could not affect the defendant. The defendant had notice of an absolute promise, which was more prejudicial than a conditional agreement. And whether the notice referred to a parol or written promise, can make no difference. It is enough that the defendant had sufficient notice to put him on inquiry. (1 *Johns. Cas.* 53.)

4. As the contract was executed, the defendant cannot resist the payment of the price, unless he has a right to rescind the contract. Where the contract is *open*, the money cannot be recovered back, but the vendee must resort to his action to enforce the performance of it. There seems to be some difference in the cases to be found *in the books, as to the right of rescinding the contract. (*Doug.* 23. *Cowp.* 818.) But I understand the law to be that the contract cannot be rescinded without the consent of both parties. In *Towers v. Barrett*, (1 *Term Rep.* 133.) there was an agreement to take back the chaise. If there is no provision in the original contract, leaving it open to the vendee to rescind or not, it cannot afterwards be rescinded, but the party must resort to his action on the contract.

Baldwin and T. A. Emmet, contra. A slave is not considered as a mere chattel. A master may make a contract with his slave, which will be binding on the master. The case of *Tom*, a negro, (5 *Johns. Rep.* 365.) admits the validity of such a contract. Whether it is so decided or not; yet it is the universal understanding in the community, that such contracts are binding. Such certificates are given every day; and it is a case in which it may be said that *communis error facit jus*. It is true, two parties are necessary to every contract. In *England*, there can be no slaves, and no rule can be found in the *English* books by which such contracts are to be governed. But in *England*, *villeins* might be enfranchised by an *implied* manumission; and if the lord entered into any contract with his *villein*, it was a virtual manumission. (2 *Bl. Comm.* 94.)

Where the owner of a slave permitted her to go out to work, and on her paying him a sum monthly, she was to have to her own use whatever she earned above the stipulated wages; and out of the earnings which she accumulated in the course of years, she purchased a negro girl, and manumitted her, the Supreme Court of *South Carolina* (1 *Bay's Rep.*) 260. held that the negro girl which the slave had so purchased and manumitted, was entitled to her freedom, and did not become the property of the master of her benefactress.

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If a man makes a contract with his wife for her benefit though not valid at law, it will be enforced in equity, and even at law, if *trustees are interposed. *A fortiori*, will a contract with a slave be enforced in favor of human liberty.

[THOMPSON J. I do not understand the counsel for the plaintiff as contending that this instrument is not valid as between the master and slave, and that the slave might not avail himself of it against his master.]

Then, whether the manumission was absolute or conditional, it affected the right of the purchaser. At the expiration of eight years, the slave would become free, without any further act of the master. The plaintiff had no power or right to sell the slave for life, after he had given him the writing by which he was made free at the expiration of eight years. A consideration to render a contract valid must be such as the party has the power to perform. (2 Lev. 161. 3 Term Rep. 22.)

Wherever there is a fraud on the part of the vendor, or a failure of warranty, the vendee may rescind the contract. It cannot be required that he should first pay the money, and then bring his action to recover it back. We consent to try our defence by the *test* offered by the plaintiff's counsel; whether, if the defendant had paid the money, he could have recovered it back in an action for money had and received to his use. In *Farrer v. Nightingal*, (2 Esp. N. P. Cas. 689.) Lord Kenyon said, "he had often ruled, that where a person sells an interest, and it appears that the interest which he pretended to sell was not the true one; as, for example, if it was for a less number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any money he had paid." "It is sufficient for the vendee to say, This is not the interest which I agreed to purchase." The same doctrine was laid down by Lord Kenyon, in *Chambers v. Griffiths*, (1 Esp. N. P. Cas. 150.) and by Lord Eldon, in *Curtis v. Hannay*, (3 Esp. N. P. Cas. 83.) The rule is most reasonable and convenient, and is clearly settled by the modern decisions.

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*It is found, by the verdict of the jury, that the written contract was concealed from the defendant; and such concealment was a fraud. Admitting that the verbal promise of the plaintiff to the slave, was known to the defendant; he might, nevertheless, be willing to purchase for a full price, knowing such a verbal promise was a *nudum pactum*, and incapable of being enforced at law.

It is said, that evidence ought to have been admitted, to show that the condition had not been performed by the slave. But the judge very properly decided, that the slave could not be bound by the decision of that fact in this collateral way; but it would still be a subject of litigation between him and

his master. A purchaser expects to have a clear and undisputed title; not such a one as may be even questionable in a court of law. No man is bound to purchase a lawsuit. (*Peake's N. P. Cas.* 131.)

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Radcliff, in reply, observed, that he still insisted that the contract between the plaintiff and the slave was void. He distinguished between a manumission *in futuro*, and a promise to manumit at a future day.

Villénage in *England* is not analogous to *slavery* in this country. A *villein* had many civil rights. He could acquire and hold property; and *copyhold* tenures were derived from villénage.

In the case cited from *Bay's Reports*, the agreements were parol; and it shows that a parol promise to manumit a slave is as valid as if it was in writing. If so, then the notice to the defendant of a parol promise was sufficient.

Per Curiam. The covenant of the plaintiff to manumit the negro in eight years, on condition of faithful service, was one that the slave could avail himself of, if the condition was fulfilled. What was said by the court, in the *case of the negro Tom*, (5 *Johns. Rep.* 365.) is to that effect. The statute (24th sess. c. 188. s. 2.) allows *the master to manumit his slave "by any certificate or writing;" and this was a conditional manumission.

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The manumission does not rest upon the principles of a contract, depending on a consideration, but it is an act of benevolence, sanctioned by the statute, and made obligatory, if in writing.

The question as to the performance or breach of this condition, could not be tried in a suit between these parties; and if it had been tried, it would not have concluded the negro. The defendants would have afterwards remained liable to a new investigation of this fact, at the instance of the negro, when the term of service had expired. If, then, the covenant was unknown to the defendant at the time of the sale, and if, under an ignorance of the writing, he purchased the negro as an absolute slave for life, he had a right to return the negro as soon as the fact was discovered, and rescind the contract. The jury have found the fact of his ignorance of the writing; and the concealment of it from him, when the sale was made, was a fraud that will vacate the contract. The law seems now to be settled, that if a man sells a different interest from that which he pretends, and especially, if the contract be founded in ignorance and fraud, the purchaser of a chattel may return the chattel, if he does it immediately on discovery of the imposition, and thereby rescind the sale. (*Curtis v. Hannay*, 3 *Esp. N. P. Cas.* 82. The opinion of *Buller, J.*, in *Tower v.*

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Barrett, 1 Term Rep. 136. *Farrer v. Nightingal*, 2 Esp. Cas. 639 *Fleming v. Simpson*, 1 Campb. N. P. 40. in notes.)

Motion denied

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*THE PEOPLE against JANSEN and others.

In an action brought against a surety on a bond given for the faithful discharge of the duty of a loan-officer under the act; (9th sess. c. 40.) it was held that the surety might set up in his defence the laches of the supervisors, in not discharging and prosecuting the loan-officer for his first default, but suffering him to continue, after repeated defaults, for upwards of ten years, when the loan-officer became insolvent; and without prosecuting the officer as required by the act; and where no notice was taken of the defaults of the principal until after the death of the surety, this laches of the supervisors was held to be a good defence, especially in a suit against the heirs of the surety. (a)

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THIS was an action of debt on a bond executed by the father of the defendants, in his life-time, as one of the sureties of *Christopher Tappen*, one of the loan-officers of *Ulster* county, under the act of the 18th April, 1786. (1 *Greenleaf's* edit. of *Laws*, 240. 9th sess. c. 40.) The bond was to the plaintiffs, in the penal sum of 7,000 pounds, and in the form prescribed by the act. The defendants pleaded, 1. *Non est factum*; 2. *Non damnificatus*, and gave notice of special matter, to be offered in evidence at the trial.

The cause was tried at the *Ulster* circuit, in September, 1808, before Mr. Justice *Van Ness*.

The plaintiffs produced the bond, the execution of which was admitted, and the loan-office books of mortgages, the endorsement on which showed the amount of the moneys received for principal and interest.

The defendants read in evidence the acts of 18th April, 1786, (9th sess. c. 40.) the act of the 20th February, 1789, (12th sess. c. 29.) and the act of 9th April, 1795, (18th sess. c. 68.) relative to the loan-office. (b)

The defendants then produced the minutes of the supervisors of the county of *Ulster*, as made by them, at their various meetings, in each year, from the year 1786 to the year 1804, during which time *Christopher Tappen* and *Joseph Gasherie* were the loan-officers, and no deficiency on their part appeared to have been taken notice of by the supervisors, until the year 1795; and no steps were taken by the supervisors to remove the loan-officers, and they were not removed, until January, 1804; though it appeared in evidence that the deficiency of the loan-officers began in 1791, and continued for several successive years. In December, 1798, the supervisors ordered suits to be commenced, on their bonds, against *the loan-officers, for their deficiencies, but they were not prosecuted, and

(a) In *The People v. Russell*, a distinction is taken between the act of 1786 and that of 1808, and the principles adopted by the court in ruling the case in the text are held inapplicable to a similar one arising under the latter act. 4 *Wendell*, 570. The surety cannot take advantage of the negligence of public officers in calling his principal to account, unless he has been damaged by such negligence. *People v. Berner*, 13 *Johns. R.* 283. And see *People v. Foot*, 19 *Johns. R.* 53. Provisions by law that agents shall account are made by the government for its own security, but they constitute no part of the contract with the surety, nor can he take advantage of their failure or delay. *United States v. Kirkpatrick*, 9 *Wheat.* 720. *United States v. Van Zandt*, 11 *Wheat.* 124. *United States v. Nichols*, 12 *Wheat.* 554. *People v. Russell*, 4 *Wendell*, 570

(b) 1 *R. S.* 370, et seq.

the loan officers were indulged from time to time, to make good their deficiencies, until the year 1803, when suits were again directed to be prosecuted against them.

Henry Jansen, the father of the defendants, and one of the sureties of *Tappen*, died in 1794. In the year 1798, *Tappen* was solvent and in good credit; and had the suit, ordered to be commenced against him, been prosecuted, with usual diligence, to judgment, the whole of the arrears might have been collected. He paid judgments to a large amount obtained against him since 1798.

A verdict was taken, by consent, for the plaintiffs, subject to the opinion of the court, on a case containing the above facts.

Gardinier, for the plaintiffs. Nothing but a performance of the condition of the bond, given by *Henry Jansen*, the ancestor of the defendants, or a release on the part of the plaintiffs, can exonerate the obligor or his heirs. A mere delay to sue, or suspension of a suit against the principal, will not discharge the surety. This is not the case of a suit between ordinary parties. It is brought on a bond to the people, and taken for their security.

The supervisors are public officers, and the record of their proceedings were, at all times, open to inspection. There was no concealment of the default of the principal; and the sureties cannot allege surprise, or ignorance of the *deficits* of their principal.

If the court should decide in favor of the plaintiffs, we contend they will also be entitled to interest.

Sudam and *Harison*, contra. The people, by their act, delegated to the supervisors and judges of the counties, in regard to the loan-officers and their sureties, all the *authority of the people, and the plaintiffs must, consequently, be bound by the acts of their agents. The sureties must be supposed to have executed the bond; on the faith that the supervisors would do their duty, in regard to the loan-officers.

By the 8th section of the act, (9th sess. c. 40.) the supervisors were empowered to put the bond in suit whenever it became forfeited; and they are required, (15th section,) in case of any neglect or refusal of any loan-officer to perform his duty, to remove him, and appoint another in his stead; and by the 28th section of the act, they are directed to meet on the first *Tuesday* in *October*, of every year, to inspect and examine the mortgages, minutes and accounts of the loan-officers, and, in case of any neglect of the loan-officers, the supervisors are to remove them.† If, then, the supervisors performed the duties required of them by the act, they must have known of the deficiencies of *Tappen*, in 1791, 1792, 1793, 1794 and 1795, but of which no entry was made in their books. Here was a fraudulent concealment of the

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default of the principal, for several successive years. The sureties justly confided in the supervisors, the public officers of the county, that they would do their duty; and if, at the end of the year, either of the loan-officers should be found guilty of a default, that he would be removed. They never could imagine, that they should be made responsible, after the lapse of ten years, when the supervisors, knowing of the default, continued him in office, and passed over his defaults for several successive years, without notice. It was the duty of the supervisors to give notice to the surety, of the default of the principal. *Tappen* was solvent in 1798, and possessed sufficient estate to indemnify the people, had he been prosecuted with due diligence. The surety died in 1794, and his heirs could not know of the situation of the suit in 1798. The defendants are, therefore, injured by the delay and neglect of the supervisors.

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The case of *Peel and others v. Tatlock* (1 *Bos. & Pull.* 419.) shows that a *surety will not be liable, if the default of the principal has been concealed from him.

In *Rees v. Berrington*, (2 *Vesey*, jun. 540. 544.) Lord *Loughborough* held, that where an obligee in a bond, with the knowledge of the surety, took notes of the principal, and gave further time of payment, the surety was discharged; and Lord *Thurlow* held, where a bond was put in suit, at the request of the surety, and judgment recovered, but the creditor, without the privity of the surety, agreed to stay execution, the surety was discharged.

Though a court of equity would relieve the defendants, it does not follow that a court of law will not also relieve them, when the facts are such as clearly entitle them to relief. It is true, Lord *Ellenborough*, in the case of *The Trent Navigation Company v. Harley*, (10 *East*, 34.) said, he did not know that the *laches* of the obligees, in not calling upon the principal, as soon as they might have done, had the accounts been properly examined, from time to time, could operate as an estoppel at law, whatever it might in equity. But there is no reason why a surety, where the facts are ascertained, should be driven into a court of equity for relief.

There is no distinction between sureties for officers of government, and any other sureties. The ground on which the defendants claim relief, is the gross and wilful *laches* of the supervisors, from year to year. Where persons, who have the control and management of the contract or subject, give time to the principal, it discharges the surety. It shows that they do not rely on the surety, but look to the personal responsibility of the principal.

At all events, the defendants cannot be answerable for interest or damages, in a case where the delay is entirely owing to the plaintiff's own negligence. Sureties are always favored in law.

E. Williams, in reply. The defence set up in this case *is unknown to a court of law. This was the opinion of Lord *Ellenborough*, in the case which has been cited. That case is perfectly analogous to the present. If there is any defence at law, it must be either because there has been an enlargement of the time of payment beyond the condition of the bond, or a fraudulent concealment of the default of the principal. By an enlargement of the time of payment, I do not mean a mere indulgence on the part of the obligee, or a delay to prosecute, but giving a further term of credit, within which the principal could not be prosecuted. If a surety requests the obligee to sue the principal, and he refuses, it may, perhaps, be a good defence in equity; but the mere delay of a suit, without consulting the surety, has never been held a defence at law. Indulgence to the principal may, oftentimes, prove beneficial to the surety; and in the present case, by continuing *Tappen*, he was enabled to pay 2,000 dollars of his former deficiencies.

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The case of *Peel v. Tatlock* fully supports the doctrine for which we contend; that mere indulgence or delay to the principal will not discharge the surety.

It is objected, that we did not give notice of the defaults prior to 1795; but it does not appear that the supervisors knew of any default prior to that time. The loan-officers and supervisors are the servants of the people, who might discharge them if they pleased; but they were not bound to discharge, and if they did not, it affords no defence to the defendants.

THOMPSON, J., delivered the opinion of the court. This is an action of debt upon the penalty of a bond given to the people of this state, (pursuant to the act of the 18th of April, 1786,) by the defendants' ancestor, as security, that *Christopher Tappen* should well and truly perform the office and duty of one of the loan-officers of *Ulster* county. The loan-officer having neglected to pay into the treasury the money by him received, and *having become insolvent, recourse is now had to his security. The case discloses that the deficiency of the loan-officer began as early as the year 1791, and continued to increase almost every year until 1798, but he was not removed from office until the year 1804. And no entry of any deficiency was made in the minutes of the board of examiners of the loan-officers' accounts, until the year 1795. The defendants' ancestor died in the year 1794, and in the year 1798 a suit was commenced against the loan-officer, who was then solvent, but was not prosecuted to judgment, nor were the arrears due from him paid up and settled. Under these circumstances, the first question that arises, is, whether the defendants can, in a court of law, avail themselves of these facts in their defence. And if so, then whether they are sufficient to exonerate them from the payment of the loan-officer's deficiencies. I am unable to discover any good reason for sending the defendants into a

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court of chancery for relief. There is nothing in the nature of the defence to make it peculiarly a subject of equity jurisdiction. That the ancestor of the defendants was a *surety* only, appears upon the face of the bond; and whatever would exonerate the security in one court, ought also in the other. The facts being ascertained, the rule of law must be the same in this court as in the Court of Chancery. And this seems to be the light in which the subject was viewed, in the case of *Rees v. Barrington*, (2 *Ves. jun.* 542.) The doctrine of this case clearly is, that whether a surety has been discharged or not, is a legal principle, and that, if the form of the security and mode of proceeding at law, would authorize an inquiry into the fact, whether security or not, the defence would be the same at law as in equity. Lord *Loughborough* says, it is the form of the security that forces these cases into equity. For where the principal and security are bound jointly and severally, the security cannot aver, by pleading that he is bound as surety; *but if he could establish that at law, the rule or principle by which his liability is to be determined, is a legal principle. The case of *The Trent Navigation Company v. Harley* (10 *East*, 34.) does not appear to me essentially to impugn this doctrine. The *laches* of the plaintiffs in that case, on which the security relied for their exoneration, was disclosed by special pleas, on which issues were taken. If the defence set up had not been available at law, a demurrer would probably have been interposed. But the parties went to trial upon the facts. And the court say, in their judgment, upon the motion for a new trial, that none of the pleas appear to have been proved. It is true, Lord *Ellenborough* says, the question is, whether the *laches of the obligees, in not calling upon the principal as soon as they might have done*, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties. And he adds, I know of no such estoppel at law, whatever remedy there may be in equity. If the position here intended to be laid down is, that mere delay in calling on the principal, will not discharge the surety, it is, I think, a sound and salutary rule, both at law and in equity. In the case of *Peel v. Tatlock*, in the C. B., (1 *Bos. & Pull.* 419.) where the *laches* of the plaintiff was relied upon by the guarantee, in discharge of his responsibility, it was never suggested that this was not a defence at law; and it was submitted to the jury as a question of fact, whether, under the circumstances appearing in evidence, the plaintiff had not waived the guaranty, and exonerated the defendant. That the defence set up in the case before us ought to be admitted in a court of law, appears to be fortified by the consideration, that this is a bond of indemnity under a penalty; and which, under the statute, requires an assignment of breaches. The occasion of this statute was, to moderate the rigor of the common law, which drove parties into equity for relief against the

penalty; and since the statute, courts *of law have the same jurisdiction, in this respect, as the Court of Chancery had before. The defence, therefore, in my opinion, is admissible at law, and the effect and validity of it, forms the next subject of our inquiry.

The verdict has been taken by consent of parties, subject to the opinion of the court, upon the facts stated. So that, if any part of the defence was a subject proper for the consideration of a jury, that is waived by the form in which the case is presented. This case differs essentially from the ordinary case of a security in a bond to a private individual. In such case, the obligee is under no positive injunction, or legal obligation, to watch over the conduct of his principal debtor, and at stated periods to examine into his accounts, and in case of failure in punctual payment, to adopt measures calculated to relieve the security. The risk of the insolvency of the principal is assumed by the surety, and the liability of the latter continues, unless he should, at least, require of the creditor to enforce payment. But the situation of the security in this case is widely different. The statute under which the bond was taken, makes it the duty of the supervisors in each county, together with one or more of the judges of the common pleas, annually to meet, and carefully to inspect and examine the minutes and accounts of the loan-officers; and if it be found that any loan-officer has refused or neglected to perform the duty enjoined upon him, they are directed to elect another in his stead. The security had a right to look to the provisions of this statute, and to calculate his liability, on the presumption that the duties enjoined on these public officers would be faithfully and punctually discharged; and if so, that he could in no event be responsible for more than one year's deficiency. There can be no doubt that the plaintiffs are chargeable with the consequences of the neglect, or breach of duty of their agents or public officers, intrusted with this business.

I should have no doubt but the defendants would be *responsible for the first year's deficiency of the loan-officer, had the judges and supervisors complied with the duty enjoined upon them by the statute, and removed him from office. This, however, they did not do, until twelve or thirteen years after, when the loan-officer had become insolvent. The defendants are not chargeable with notice of these deficiencies. There is no evidence that they knew their ancestor was surety for the loan-officer. The minutes of the judges and supervisors, which are public records, might have charged the ancestor with this knowledge, had those minutes shown the deficiency during his life-time. But that was not the case. The ancestor died in the year 1794, and although the first deficiency was in the year 1791, there is no entry of any default on the minutes until the year 1795. This is another circumstance calculated to mislead and lull the security to sleep. Again, in the year 1798,

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a suit was commenced against the loan-officer, at which time he was solvent, and able to have paid all arrears. Indulgence, however, was from time to time given, and the suit not prosecuted to effect, or the arrears paid up. This was a violation of the spirit and intention of that clause in the statute which directs that suits on bonds given by the loan-officers should be stayed on the defendant's paying or tendering the damages which had arisen by the breach of the condition of the bond, together with the costs due. These circumstances are sufficient to show, beyond a doubt, that the neglect and indulgence of the judges and supervisors, in direct violation of the duty imposed upon them by the statute, have occasioned the loss. And it would be extremely hard and unjust to permit a recovery against the surety, in the face of such repeated *laches*. In the case of *Peel v. Tatlock*, (1 Bos. & Pull. 422.) *Buller, J.*, says, if any new debt be incurred, or the demand enlarged, it might be a fraud on the guarantee. And he seems to admit, as a general rule, that if any thing be done between the *creditor and principal debtor, which creates the injury to the surety, it will go in discharge of his responsibility. This is a just and equitable principle, and one which ought to be applied to the case before us.

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We are, accordingly, of opinion, that the defendants are entitled to judgment.

Judgment for the defendants.

MAIGLEY against HAUER.

Same against Same.

Same against Same.

Where there is a consideration expressed in a deed, without saying "and also for other considerations," proof of any other consideration than the one expressed, is not admissible. (a)
If the consideration is not truly stated, the party must seek his relief in the Court of Chancery.

IN ERROR, on *certiorari* from a justice's court.

The return stated, that, on the 25th of *February*, 1809, in *Columbia* county, *Hauer* sued *Maigley* by summons. The parties appeared, and the plaintiff declared, stating a *colloquium* about a farm possessed by the plaintiff, and in which he had a life estate; and it was agreed that if the plaintiff would give up the possession to the defendant for life, the defendant would deliver to the plaintiff yearly, during his life, one third of the wheat and rye which the defendant should raise, and that he would maintain the plaintiff for life with victuals, clothes, &c., and the plaintiff averred that he did deliver up the possession to the defendant, who took and still occupies

(a) Acc. *Jackson v. Delancy*, 4 Cowen, 427. But see *Jackson v. Pike*, 9 Cowen, 63

the farm; and that the defendant has refused to maintain the plaintiff, although often requested, &c.

The defendant pleaded *non assumpsit*.

There was a trial by jury, and the plaintiff proved the agreement, and that the defendant, after maintaining the plaintiff for three years, had afterwards refused; that the conveyance of the farm was by articles of agreement under seal; and after it was executed, the defendant *further agreed to maintain the plaintiff as above stated. The articles of agreement conveyed the farm to the defendant for the life of the plaintiff, and it contained a covenant by the defendant to deliver yearly to the plaintiff one third of the winter grain, and also to pay the ground rent. There was parol evidence of the agreement to maintain the plaintiff, which was objected to, but admitted, as being an independent and separate contract. The defendant moved for a nonsuit, on the ground that there was no consideration for the parol promise.

The justice charged the jury, that the plaintiff must prove the contract as laid, and a consideration and a breach; and that if he failed in either, they ought to find for the defendant. The jury found a verdict for the plaintiff for 20 dollars.

Van Buren, for the plaintiff in error. He cited 1 *Johns. Rep.* 139. 2 *W. Black.* 1249. 3 *Johns. Rep.* 210. 506. 5 *Wils.* 276. 2 *Atk.* 384.

E. Williams, contra.

Per Curiam. It is a settled rule, that where the consideration is expressly stated in a deed, and it is not said also, and for other considerations, you cannot enter into proof of any other, for that would be contrary to the deed. This was so decided by this court in *Schemerhorn v. Vanderheyden*, (1 *Johns. Rep.* 139.) and again in *Howes v. Barker*, (3 *Johns. Rep.* 506.) The same rule prevails in equity according to the cases of *Clarkson v. Hanway*, (2 *P. Wms.* 203.) and of *Peacock v. Monk*, (1 *Vesey*, 127.) and the remedy for the party, if the deed be contrary to the truth of the case, is by seeking relief in equity against the deed, on the ground of fraud or mistake, as was intimated in the case of **Howes v. Barker*; and as was adopted in the case of *Filmer v. Gott*, (7 *Bro. P. C.* 70.)

If the proof as to the consideration arising from the sale of the farm be put out of view, there was no consideration at all for the promise to maintain the defendant in error. It was a mere *nudum pactum*, and the verdict in each cause was contrary to law, and the judgment in each cause must be reversed.

Judgment reversed.

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LE ROY and others against THE UNITED INSURANCE COMPANY.

A quantity of hides were purchased at *Montevideo* for American merchants, and shipped on board of an American vessel for *New-York*, and an [*344]

export duty on the hides was paid to the officers of the Spanish government, and the vessel was ready for sea, but was prevented sailing by a British squadron, which afterwards captured the place, and was not permitted to sail until she had paid an export duty on the cargo to the officers of the British government. On the arrival of the vessel at *New-York*, the hides were sold to American merchants in *New-York*, who shipped them in another American

vessel to *Amsterdam*, accompanied with a certificate of origin from the French consul in *New-York*, declaring that "they were purchased and exported from *Montevideo*, prior to the capture of that place by the British," which certificate was a usual and customary document on board American vessels bound to *France* or *Holland*, and rendered necessary by the decrees of *France* and *Holland*. The vessel was captured by the British, and condemned as enemy's property, or otherwise subject to forfeiture, on the ground of a continuity of voyage from an enemy's colony to the mother country of an enemy of *Great Britain*. The hides were purchased the 24th *June*, at 10 cents per pound, and transhipped about the 7th *July*, and were invoiced at 12 cents per pound, being the value thereof at the time. In an action on an open policy of insurance on the hides, it was held, that the certificate of origin being a customary document for such a voyage, and substantially true, and put on board, *bona fide*, by the insured, there was no breach of the warranty of American property; and that the insured were entitled to recover for a total loss. The insured was not bound to disclose to the insurer that such a paper was on board; it being a paper in the usual course of trade; and it is always open to inquiry how far a paper, though intentionally false, was material to the risk. (a) The amount of loss, in this case, was held to be the prime cost of the hides, or 10 cents per pound, and the charges thereon.

It seems, that in estimating a total loss on an open policy of insurance, the value of the goods at the outset or commencement of the risk, with the usual charges, is what the insurer ought to pay; and that the prime cost is generally the safest and best rule of ascertaining such value; especially where the goods are purchased for exportation. (b)

(a) If, by the usage of the trade insured, it be necessary that certain papers should be on board, the concealment of those papers cannot affect the plaintiff's right to recover on the policy. *Livingston v. Maryland Ins. Co.* 7 *Cranch*, 506. The operation of any concealment on the policy depends on its materiality to the risk, and this materiality is for the determination of the jury. *N. Y. Firemen Ins. Co. v. Walden*, 13 *Johas. R.* 513.

(b) *Acc. Minerva v. Columbian Ins. Co.* 10 *Johas. R.* 75.

plaintiffs, they were accompanied with a paper called a *certificate of origin*, and another paper called a *certificate of importation*. The former was dated the 23th of July, 1807, signed by the French consul, or commissary of commercial relations at New-York, under the seal of the commissariat, which certified, that, "agreeably to the papers and other documents presented to us, by Mr. *William Bayard*, (one of the plaintiffs, of the house of *Le Roy, Bayard & M'Evors*,) "merchant, of the city of New-York, the 5,839 hides, by him laden on board of the ship *Minerva*, Captain *Caldwell*, under destination for *Amsterdam*, were purchased and exported from *Montevideo*, prior to the capture of that place by the *English*."

This *certificate of origin* was a usual and customary *document on board of vessels bound from the *United States* to *France* and *Holland*; and by the decrees of those countries, it was required that a certificate should accompany all goods exported in such vessels to *France* and *Holland*, certifying, that such goods neither came from *England*, nor her colonies, nor belonged to *English* commerce, in order to insure the entry of such goods in the ports of *France* or *Holland*, pursuant to such decrees.

The certificate of importation was as follows :—

"Port of *New-York*, district of *New-York*: These are to certify, that in the ship *American Eagle*, *King*, master, from *Montevideo*, were imported on the 8th of June, 1807, 5,839 hides, consigned to *J. Clason* and *J. R. Livingston*, and for which the duties have been landed, according to law. Given, &c., the 28th July, 1807."

The words in *italics* were written, the rest being printed. In making out the certificate, the clerk at the custom-house, through mistake or inadvertence, omitted to erase the printed word "for," and the words "the duties;" hides being a raw material, on which no duties are payable by law; and if those words had been obliterated, (as they ought to have been,) the remaining words would have stated the simple fact that "the hides had been landed according to law."

These two documents were found on board the *Minerva* at the time of her capture, and were exhibited in proof by the captors, on the trial, in the Court of Admiralty. The sentence of the Court of Admiralty, as pronounced by Sir *William Scott*, was set forth in the special verdict; and the hides were condemned, on the ground of a continuity of voyage, from a colony of the enemy of *Great Britain* to the mother country of such colony, or its allies, and the documents above-mentioned were among the proofs on which the decree of condemnation was founded.

The insured abandoned for a total loss, on the 26th *of November, 1807, and exhibited to the defendants the usual preliminary proofs, and demanded payment.

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The hides, at the time of their shipment, and before making the insurance, were invoiced at the price of *twelve cents per pound*, being the value thereof, exclusive of charges. The hides were purchased by the plaintiffs in *June, 1807*, of the original importers, with the intention of exporting them to *Europe*; and *Bayard*, one of the plaintiffs, was informed, at the time of the purchase, by *J. Clason* and *J. R. Livingston*, the importers, or one of them, that the hides were purchased by their agent at *Montevideo*, in *June, 1806*, and had been actually laden on board of the ship called the *American Eagle*, while *Montevideo* was in possession, and under the government of *Spain*, and that an export duty was paid on the hides to the officers of the government of *Spain*, at that place, and that the *American Eagle*, after the lading of her cargo, and payment of the duties, and being ready for sea, was prevented from sailing from *Montevideo*, on account of the place being invested by a *British* force, and did not sail from that place until after it was captured by the *British*, and was not permitted to clear out until after the payment of an additional export duty of *ten per cent.* on the cost of the hides and the residue of the cargo, and which duty was paid by the consignee to the officers of the *British* government there, on which they granted a clearance for *New-York*.

The *American Eagle* sailed from *Montevideo* in *April, 1807*, and arrived in *New-York* in the month of *June* following; and in consequence of the quarantine laws, then in force, she was not permitted to go up to the city, as no hides are permitted to be landed within the city between the 1st of *June* and the 1st of *November*, in any year; but they might be landed at any other place, within the district of *New-York*, during that period.

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There being no private warehouses at the quarantine ground, it is usual, in cases where vessels cannot proceed *to the city by reason of the quarantine laws, for the collector of the port to suffer such cargo to remain on board the vessel for a reasonable time, to give the importer an opportunity to sell and dispose of the same, before it is actually landed; such cargo, however, being first duly entered at the custom-house, and, if subject to duty, the duties being first duly paid or secured according to law. The hides in question, on the arrival of the *American Eagle*, were duly entered at the custom-house, and as no duty was payable on them, by the laws of the *United States*, they were not, for the reasons above-stated, actually landed, but after the purchase of them by the plaintiffs, were transhipped, at the quarantine ground, within the port of *New-York*, from the *American Eagle* to the *Minerva*; and such transshipment, under the circumstances above-mentioned, is considered by the officers of the customs in the port of *New-York*, and by the usage of the merchants of the said city, as equivalent to an actual landing of the property, previous to its exportation.

In case the court should be of opinion that the plaintiffs were entitled to recover for a total loss of the hides, and at the invoice and value thereof, at the time of the shipment thereof, and before the making the said insurance, together with the usual and just charges, the jury, by their special verdict, assessed the damages at 13,443 dollars and 42 cents.

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But if the court should be of opinion that the plaintiffs were not entitled to recover for a total loss, but only at the rate of the actual cost, or price paid by the plaintiffs for the hides, together with the usual and just charges; then the jury assessed the damages at 11,376 dollars and 85 cents. And in case the court should be of opinion that the plaintiffs were only entitled to recover for a return of premium, then the jurors assessed the damages at 1,010 dollars and 41 cents.

**David A. Ogden*, for the plaintiffs. From the facts stated in the special verdict, the plaintiffs are entitled to recover for a total loss. All the warranties contained in the policy have been fulfilled; and the only question which can arise is as to the amount of damages; whether they are to be estimated according to the original cost, or the invoice price and value at the time of the shipment. The true rule is, the value of the subject at the time of the shipment; and the cost is only a means of ascertaining the value. The first price of a thing does not always afford a certain criterion of its true value; for it may have been purchased very dear or very cheap. (*Marshall on Ins.* 621.) In *Lewis v. Rucker*, (2 Burr. 1167. 1170. *Park*, 132.) Lord Mansfield said, the insurer "must pay the prime cost, that is, the value of the thing insured at the outset." In *Steevens v. The Columbian Insurance Company*, (3 *Caines*, 43.) the court said, "that in an open policy on goods, the rule by which to estimate a total loss, was the invoice price, and all duties and expenses, till they are put on board, with the premium of insurance; that in an open policy on the vessel, her value at the time she sails, with the expense of her outfit and premium, was the rule by which to estimate a total loss." In *Gahn and Mumford v. Broome*, (2 *Johns. Cas.* 47.) it was laid down as a general rule, that in an open policy, the invoice price is the value which, upon a total loss, the insured is entitled to recover. All the books speak of the invoice price, that is, the value at the outset, or at the time of shipment.

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Hoffman and *Harison*, contra. We do not mean to defend the decision of Sir *William Scott*, as to the ground of a continuity of voyage; but we shall contend that the plaintiffs are not entitled to recover for a total loss, for another reason. The plaintiffs put on board a false paper, the certificate of the French consul, which was the real cause of condemnation. This certificate declares, that the hides were purchased and

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exported from **Montevideo*, prior to the capture by the *British*. The special verdict states, that this was a usual and customary document; but because the decrees of *France* rendered such a document necessary, it does not follow that it should not contain the truth. Now it appears from the case, that the hides were not, in fact, exported from *Montevideo* until after the *British* were in possession of the place. The object of the certificate was to secure an entry in *Amsterdam*; but though it might operate to protect the property against *France* or her allies, it increased the risk of capture from *British* cruisers. In the case of *Blagge v. The New-York Insurance Company*, (1 *Caines*, 549.) the court held, that under a warranty of neutral property, if there was any false paper, which increased the risk of belligerent capture, the insured could not recover. It was well known that the *British* courts condemned on the ground of a continuity of voyage; any paper, therefore, which would give color for condemnation, is sufficient to discharge the insurer.

If the vessel was captured on account of this document, the insured cannot now be permitted to explain or contradict it. Such document by a foreign minister must, as Sir *William Scott* observed, be conclusive evidence of the fact which it states. A neutral is bound to have true and authentic papers. If the real truth had appeared in this case to the Court of Admiralty, the condemnation would not have taken place. It was admitted, that if the goods had been shipped after the capture of *Montevideo* by the *British*, there would have been no continuity of voyage; but the certificate of the *French* consul was considered as decisive evidence to the contrary.

2. Some general rule must be established, by which to ascertain the amount of loss. The prime cost is a fixed measure of damages; but if the value at the time of subscribing the policy, or the shipment, is to be the guide, it will always fluctuate with the rise and fall of the *market. If the insured gets the cost of the goods, and all charges, he is completely indemnified. The *prime cost* and the *value* are the same; and when the books speak of the prime cost, or *invoice* price, they mean the invoice of the *cost* of the goods, not the invoice made up by the shipper, with a view to exportation. But in this case, the goods were purchased with a view to an immediate exportation, and not for the purpose of a sale here. This is a strong reason for considering the cost as the value of the goods.

3. If the certificate, being a *false* paper, ought not to have been on board, the plaintiffs are not entitled to a return of premium, for the defendants have run the risks prior to the capture; and if they have run any part of the risk, there can be no return of premium. Again, the policy was dated the 7th *July*, when the goods were shipped, and the certificate is dated the 25th *July*; from the 7th to the 25th *July*, therefore

the goods were at the risk of the defendants in the port of *New-York*.

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T. A. Emmet, in reply. 1. The goods were purchased when *Montevideo* was a *Spanish* colony; they were shipped and ready for sea, and had paid the *export* duty to the *Spanish* government. They had acquired all the rights and privileges of neutral property, when the *British* came. They then paid the *British export* duty. They had, therefore, a double right to be respected; by *Spain* or her allies, for having paid a *Spanish* duty; by *Great Britain*, for having paid the *British* duty. If there is any falsehood in the certificate, it is of the slightest kind; but in every just and liberal sense it is true. According to the reasoning of the defendants, because the plaintiffs have paid duties to both nations, in order to protect the goods against both, they are for that reason liable to be condemned by both. The property was *bona fide American*, and was not exported by the importer. The proof of the neutral property *could be made in *New-York*; and the performance of the warranties has been found by the special verdict.

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It is true, that where there is a warranty of neutral property, unneutral papers must not be on board. It is not every false paper that will amount to a breach of the warranty; but it must be an unneutral paper. Is this certificate of origin, then, an unneutral paper? Whether true or false, does it affect the fact of the neutrality of the property? The objection, then, of its being false, fails, *in limine*. It can only affect the question as to the continuity of the voyage; but this country has never acknowledged the *British* rule, or the rule of 1756, on this subject.

Again, it is found to be a usual and customary document, for all *American* vessels bound to *France* or *Holland*. The defendants must have known, as the insurance was to *Amsterdam*, that such a paper would be on board. The insurers are bound to know the usage and course of trade. (*Park*, 251. *Marshall*, 474. 1 *Burr*. 341. 350.) In *Planche v. Fletcher*, (*Doug.* 251.) Lord *Mansfield* said, that the practice of taking *Ostend* papers, being the course of trade, was to be deemed to be known to every body. The defendants then knew that there would be a certificate of origin on board, and, on the ground now contended for, with the risk of certain condemnation by the *British*. How then can it be said, that the risk has been increased? If there had been no certificate of origin on board, and the property had been condemned by a *French* court for that reason, the defendants would have refused to pay, because a usual and necessary document was not on board.

2. The value at the *outset*, or the commencement of the voyage, is the true value. The insured, in case of loss, is to be put in the situation he was in at the time the risk or voyage

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commenced. If goods are given by a father to his son, to set him up in trade, and he exports them, is the insurer to pay nothing, because the goods cost the insured nothing? *Prime cost* is synonymous *with *value at the outset*. *Marshall* says, the *prime cost* or *invoice price*. The invoice is a fair document of trade, made by the merchant, at the time of shipment; and is for the information of the consignee or merchant abroad, as to the value of the goods at the port of shipment, and is a guide as to profit in the port of destination. The invoice, which makes a part of the preliminary proof, is the invoice of shipment. *Prime cost* is the value or cost at the port of shipment, as distinguished from the value at the port of delivery, where the expenses and profits are added.

3. The insurance must be on all the risks, or none. There can be no apportionment of the risk. It does not appear from the verdict when the goods were shipped.

THOMPSON, J., delivered the opinion of the court. The objection raised by the defendants' counsel, against a recovery as for a total loss, is, that the vessel had on board a certificate of origin from the *French* consul, and that the defendants were not informed of this document. It is said to have been a false paper, and the efficient cause of the condemnation.

The *French* consul certifies, that agreeably to the papers and documents, presented to him by *William Bayard*, the hides in question were purchased and exported from *Montevideo*, prior to the capture of that place by the *English*. And, according to the finding of the jury, the purchase of the hides, the lading them on board, and the payment of the export duties, all happened while *Montevideo* was in possession of the *Spaniards*; and these were the most essential acts in the process of exportation, as far as related to the belligerent policy, on the subject of such colonial trade. It may, therefore, be questionable, whether this certificate of origin ought to be considered as false. But admitting it not to be strictly true, there was no evidence of any *mala fides* in the plaintiffs. The jury have not found any fraud in *them in respect to the contents or concealment of the paper. Independent, however, of these considerations, a conclusive answer to the objection is, that it is found by the jury that such a certificate was a *usual and customary document* on board of *American* vessels, bound to *France* and *Holland*; and one required by decrees of those countries to insure an entry. It was, then, a paper not necessary to have been formally disclosed, because the insurer must have known it would be on board. It is not to be supposed they were ignorant of this course, and of this necessity. The assured may be innocently silent as to those things which the underwriter ought to know. (*Park*, 183.) The insurer, in estimating the price at which he is willing to take the risk, must have under his consideration, the nature of the voyage

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to be performed, and the usual course and manner of conducting it. Every thing done in the usual course is presumed to have been foreseen, and in contemplation, at the time he engaged. He takes the risk upon a supposition that what is usual and necessary will be done. (1 *Burr.* 348.) The underwriters are chargeable with the knowledge of this document being on board, and so took the risk of the consequences of it upon themselves. If this document exposed the subject to loss, by means of one belligerent, the want of it would equally have exposed the property to loss from another. It is always a question how far the want of disclosure of a paper, admitting it to be intentionally a false one, was material to the risk. This was the doctrine in *Barnwell v. Church*, (1 *Caines's Rep.* 217.) It is a well settled rule, in the law of insurance, that matters which are presumed to lie equally in the knowledge of both parties need not be disclosed. (3 *Burr.* 1605. *Doug.* 238. and *Mayne v. Walter, Park*, 196.) There was no breach of warranty in the present case. The plaintiff did not undertake to warrant against the consequences of the importation of *the hides from *Montevideo*, any further than that they themselves were not the importers. We cannot, therefore, see any substantial objection to a recovery for a total loss. And the remaining question is, Upon what principles shall the loss be computed?

In the case of *Mumford v. Broome*, (1 *Johns. Cas.* 120.) decided in this court, it is said to be a settled rule, that in an open policy on goods, the invoice price is the value which, upon a total loss, the insured is entitled to recover. That this affords not only an equitable but a certain rule, not influenced by the *fluctuations of value* which subsequent circumstances may produce. The invoice price, as here understood, is evidently the prime cost, this being a fixed and certain criterion, which is the reason assigned for the rule. And besides, it appears from the case, that at the time of effecting the insurance, an account stating the price at which the goods had been *purchased*, was exhibited to the underwriters, for the purpose of showing the interest intended to be insured. Although an invoice, strictly speaking, may be a document transmitted from the shipper to his factor or consignee, containing the particulars and prices of the goods shipped; and when understood in this sense, and made out without regard to the prime cost of the articles, it might be objectionable as a rule of evidence by which to estimate the value of the subject; yet invoice is sometimes used and understood, as containing an account of the prime cost of the article specified. Thus, in *Marshall* it is said, the loss is estimated according to the *prime cost*, that is, the *invoice price*. And in *Magens* (vol. 1. p. 37.) it is laid down that the *invoice of the cost* is the rule by which the loss is to be computed. (*Burns on Ins.* 158.) It is, in the opinion of the court, unnecessary here to establish any general

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rule on the subject. Whatever the rule ought to be, we think, in the case before us, in computing the loss, the hides must be estimated at ten cents per pound, that being the prime cost. And *it is peculiarly fit and reasonable to adopt this as the price here, because it will be a complete indemnity to the assured, and as the hides were not only purchased for the express purpose of exportation, but never were landed, being purchased and transhipped at the quarantine ground. An inquiry into their real value, or market price, must, therefore, be attended with some degree of uncertainty. The prime cost of the goods might not, in many cases, be a just rule of computation, as where they were not purchased with a view to an immediate exportation, and had remained on hand for a considerable length of time. But in matters of commerce, the plainest and simplest rules are always the best. And I should incline to think that, generally speaking, the prime cost would be the best rule by which to test the value of the subject. The prime cost is commonly the market price of the article. And as the shipment, in the usual course of business, is made soon after the purchase, the prime cost is, ordinarily, the real value of the subject. In a valued policy, the value inserted is always understood to be the fair amount of the prime cost of the goods. When the insurance is, *bona fide*, meant as an indemnity, it must be taken that the value was so fixed as that the insured might, in case of loss, have an indemnity, and no more. (*Condy's Marsh.* 288, 289.)

In the case of *Lewis v. Rucker*, (2 Burr. 1167.) Lord Mansfield seems to consider prime cost and value in the policy as importing the same thing. He says, that in case of a total loss, the prime cost of the property insured, or the value mentioned in the policy, must be paid by the underwriter. And again, the *prime cost*, that is, the *value* of the thing insured at the outset, is what the underwriter has to pay. (*Marshall*, 288, 289.) There seems to be no good reason why the same rule should not prevail in computing the loss on an open policy; and that the value of the goods, at the outset, or commencement of the risk, together with the customary *charges, should not be the sum the underwriter ought to pay. It becomes, then, in a great measure, a question as to the rule of evidence by which this is to be ascertained. And the prime cost, especially where the goods are purchased for exportation, appears to me to be the plainest and simplest rule, and less exceptionable than an inquiry into the market price of the articles. This is fluctuating, and always more or less uncertain. The former rule will always indemnify the assured; and the result of an inquiry, according to the latter, will depend upon the opinion of a jury, formed, perhaps, from the clashing testimony of witnesses.

Without intending, however, to lay down any general rule, we adopt prime cost as the principle upon which, in this case,

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the loss must be computed, and according to which, by the verdict of the jury, the plaintiff is entitled to judgment for 11,376 dollars and 85 cents.

Judgment accordingly.

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HOTCHKISS
v.
RELIGIOUS
SOCIETY.

HOTCHKISS *against* THE TRUSTEES OF THE FIRST RELIGIOUS SOCIETY IN THE TOWN OF HOMER.

IN ERROR, on *certiorari* from a justice's court. The action in the court below was brought by the defendants in error, being an incorporated religious society, against the plaintiff in error, to recover the amount of his subscription to certain articles of agreement, made by the members of the society for raising a certain annual sum for the support of a minister of the gospel, during the period of six years, from the 20th December, 1802.

A corporation
may sue, though
it cannot be
sued, before a
justice's court.

The plaintiffs below appeared by attorney; and after issue joined, and a trial by jury, a verdict was found for the plaintiffs.

On the return to the *certiorari*, several objections were *made to the proceedings before the justice, which were submitted to the court, without argument; but the only question decided by the court was, whether the justice had jurisdiction, the plaintiffs being a corporation.

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Per Curiam. The suit below was brought by a religious society, in its corporate capacity, and the question is, whether the justice had jurisdiction of the case. It was lately decided in this court, (5 *Johns. Rep.* 347.) that a corporation cannot be sued before a justice. There are inseparable difficulties in the way of a suit against a corporation, among which it is sufficient to mention, that the justice has no process provided by the act, to compel a corporation to appear. But when they are plaintiffs, they can constitute an attorney to appear for them, and conduct the suit, and the jurisdiction of the justice extends to all personal actions, where the demand does not exceed 25 dollars. The only objection to the cognizance of a suit by a corporation, is to the form of the execution provided by the statute, which is to issue against the goods and chattels, and in default of the goods and chattels, against the body of the party who may not be specially exempted; and if the plaintiff fails in the suit, the defendant is entitled to the same process for his costs, and for the balance which, in cases of set-off, may have been found in his favor. The execution, so far as respects the body, could not be executed against the corporation, nor could such an execution issue in any other court. The defendant then would have all the remedy that could be afford-

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ed him, if he was sued in a higher court. This objection does not, therefore, seem sufficient to destroy the jurisdiction of the justice. If the judgment then be in favor of the defendant, the execution can issue in the usual form; and it would be effectual, as against the goods and chattels of the corporation, and could only be inoperative as to the residue of it. The defendant would still have adequate remedy upon his judgment, and all *that could be afforded him, if express jurisdiction had been given in the case. There is a very great convenience to all parties, in sustaining such suits; for to compel a corporation to sue for small demands in the higher courts, would operate oppressively, as to costs, whichever party might be entitled to them.

The provisions of the ten pound act do not seem to furnish any other objection to the suit, than that arising from the form of execution, and for the reasons already mentioned, that objection does not appear, of itself, to be sufficient.

The judgment below must, accordingly, be affirmed.

Judgment affirmed.

DELAVERGNE against NORRIS.

In an action of covenant on the covenant against encumbrances in a deed; the plaintiff, if he has paid off the encumbrance, may recover the amount paid by him; but if he has not paid any thing, he can recover nominal damages only.

If he does not choose to wait until he is evicted by the mortgagee, he may satisfy the mortgage, and resort to his covenant. (a)

THIS was an action of covenant. The plaintiff declared, on a breach of the several covenants contained in a deed, that the grantor was well *seised*, &c., for the *quiet enjoyment* of the grantee; that the premises were *free from encumbrances*, and that the defendant had good *right and title to sell and convey*, &c.

The cause was tried at the *Dutchess* circuit, in *September*, 1810, before the *chief justice*.

The deed containing the covenants was proved; and there were several mortgages on the premises duly recorded, on which the plaintiff had paid the sum of 1,165 dollars and 44 cents; and the sum of 835 dollars and 30 cents still remained due on the mortgages, and unpaid by the plaintiff; but for which he claimed to recover. It appeared that the defendant was insolvent, and wholly unable to pay any part of the mortgages.

A verdict was taken for the plaintiff, subject to the opinion of the court, whether the plaintiff was entitled only to 1,165 dollars and 44 cents, or to 2,000 dollars *and 44 cents, including what still remained due on the mortgages.

The case was submitted to the court without argument.

Per Curiam. The verdict ought to be entered for the 1,165

(a) Vid. *supra*, 258, note a

dollars and 14 cents only. If the plaintiff, when he sues on a covenant against encumbrances, has extinguished the encumbrance, he is entitled to recover the price he has paid for it. But if he has not extinguished it, but it is still an outstanding encumbrance, his damages are but nominal, for he ought not to recover the value of an encumbrance, on a contingency, where he may never be disturbed by it. This is the reasonable rule; for if he was to recover the value of an outstanding mortgage, the mortgagee might still resort to the defendant, on his personal obligation, and compel him to pay it; and if the purchaser feels the inconvenience of the existing encumbrance, and the hazard of waiting until he is evicted, he may go and satisfy the mortgage, and then resort to his covenant. This is the rule as laid down by the Supreme Court of *Massachusetts*, in *Prescott v. Trueman*, (4 *Tyng's Rep.* 627.) and it is entitled to the highest respect.

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LINDSEY
v.
SMITH

Judgment accordingly.

LINDSEY *against* SMITH.

THIS was an action of *slander*. The declaration contained several counts. The first count, which was the only one objected to, stated, that the plaintiff is a justice of the peace, &c., and that the defendant, to injure him and expose him, as a justice, to prosecution for *corruption, &c., in a certain discourse which the defendant had with divers persons concerning the plaintiff, as a justice, said of the plaintiff in his office of a justice, "*Lindsey* (meaning the plaintiff) *had been feed by Abner Wood*, (meaning *Abner Wood* who then lately had a cause pending and determined before the plaintiff,) *and that he* (meaning the defendant) *could do nothing when the magistrate* (meaning the plaintiff) *was in that way against him*," (meaning the defendant.)

The defendant pleaded the general issue; and there was a general verdict for the plaintiff for 179 dollars.

J. Duer, for the defendant, moved an arrest of judgment:—

1. Because the *colloquium* does not state that the words were spoken by the defendant "of and concerning the said cause, and of and concerning the conduct of the plaintiff as a justice, in relation to the said cause."

2. Because the *innuendo* introduced new matter material to be proved.

(the defendant.) On a motion in arrest of judgment, this declaration was held sufficient.

Though an *innuendo* cannot supply the place of a *colloquium*, yet if there be a *colloquium* sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. (a)

In an action of slander, the declaration stated that the plaintiff was a justice of the peace,

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and that the defendant, meaning to injure him and expose him to prosecution for corruption, &c., in a certain discourse, &c. said of the plaintiff, in his office of a justice, "*Lindsey* (meaning the plaintiff) *had been feed by A. W.*, (meaning *A. W.* who lately had a cause pending and determined before the plaintiff,) *and that he* (the defendant) *could do nothing when the magistrate was in that way against him*,"

(a) Vid. *Gidney v. Blake*, 11 *Johns. R.* 54. *Milligan v. Thorn*, 6 *Wendell*, 412.

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3. Because it contains no explanation of the precedent words, and is inconsistent and insensible.

He cited *Van Vechten v. Hopkins*, 5 Johns. Rep. 211. 1 Com. Dig. 268. *Sayre*, 280. 6 Term Rep. 691. 8 East, 427. 9 East, 95.

Fisk, contra.

Per Curiam. The slanderous intent and application of the words charged, must be considered as established by the verdict. Here was a *colloquium* laid, which was sufficient to give application to the slander. It is averred that the defendant was discoursing concerning the plaintiff, as a justice, and that the words were spoken of him in relation to his office as a justice, and it was a question of evidence, whether the words so spoken of the plaintiff had an innocent or a slanderous and malicious *meaning. The *innuendo* cannot supply the place of a *colloquium*; but here there was the competent *colloquium* to give point and application to the words, if spoken, as the jury must have found them to have been spoken, with a scandalous and malicious intent.

The motion is, therefore, denied.

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BROWN against MOTT.

That a note was taken for the accommodation of the maker, and without consideration, it was held that the endorser was liable for the amount, after due notice of non-payment, though the plaintiff knew at the time he took the note that the endorser had received no consideration; but if there is fraud in the case, and that known to the plaintiff, the purchaser may show it in defence; and it seems, that if the plaintiff had purchased the note at a reduced price, he could not recover of such endorser more than he paid for the note. (a)

THIS was an action of *assumpsit*. The plaintiff declared on a promissory note, dated the 14th November, 1808, for five hundred dollars, made by *Daniel S. Dean*, payable to the defendant or order, six months after date. The note was endorsed by the defendant and the plaintiff, in blank; but the endorsement of the plaintiff was afterwards struck out. The note was protested for non-payment, and due notice given to the defendant, as endorser. The defendant endorsed the note, solely for the accommodation of the maker, and to enable him to raise money; but the person to whom the application was made for that purpose, refused to advance the money without another endorser. The plaintiff offered the maker to endorse the note for him, if the maker would pay him out of the money to be obtained, 250 dollars, which the maker owed the plaintiff; which he agreed to do; and the plaintiff then endorsed the note, and received the 250 dollars. The note never was in the possession of the defendant, and no consideration passed

(a) The endorsee, in an action against the endorser, can only recover the consideration which he has actually paid. *Braman v. Hays*, 13 Johns. R. 52. *Munn v. Commission Co.* 15 Johns. R. 44. See *Powell v. Waters*, 1 Cowen, 669.

between him and the maker, or the plaintiff, who knew that the defendant had endorsed the note solely for the accommodation of the maker.

At the last *Dutchess* circuit, a verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts, which was submitted to the court without argument.

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v.
MORT.

**Per Curiam.* The defendant here is regularly charged as an endorser of a negotiable note. There is no question made but that he has been duly fixed by a demand upon the maker and notice to him; but the defence is, that he endorsed the note for the mere accommodation of the maker, and that this fact was known to the plaintiff when he subsequently endorsed the note. This, however, is not, of itself, a defence. The endorser cannot set up that he endorsed the note without consideration, because, by sending the note into circulation by a general endorsement, and making it thereby a negotiable bill, a consideration is implied by the law merchant, and an inquiry into that fact is precluded. If there had been any fraud in this case, or the plaintiff had not made any advance upon the note, the taking it under the knowledge stated in the case would have let in a defence. Or if he had purchased it, or taken it up at a reduced price, it would seem that he could recover only the amount paid. (*Wiffer v. Roberts*, 1 *Esp. N. P.* 261.) But as the drawer originally raised the money upon the note with the endorsement of the present parties, the note must have been returned to the plaintiff by the subsequent holder, and he must have taken it up for the full value. He has, then, as good a right to resort to the defendant, as a prior endorser, as if he had originally received it for its value. An endorser for the accommodation of the maker, is entitled to all the privileges of an endorser, by being fixed in due season, (2 *Caines*, 343. 4 *Cranch*, 141.) and he must be equally chargeable as endorser to the persons standing after him upon the note. The cases of *Smith v. Knox*, (3 *Esp. N. P.* 46.) and *Charles v. Marsden*, (1 *Taunton*, 224.) show that the principles of the commercial law are settled, that where there is no fraud in the case, and the endorsee has given value for the bill, he shall recover of the acceptor, notwithstanding the bill was accepted without consideration, and for the accommodation *of the drawer, and that fact was known to the endorsee when he took the bill, and though he even took the bill *after it was due*.

It is impossible to distinguish this case in principle from those last-mentioned, and the plaintiff is entitled to judgment.

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Judgment for the plaintiff.

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TENET

v.

PH. INS. Co.

TENET against THE PHOENIX INSURANCE COMPANY

A vessel was insured from New-York to Bordeaux. The policy contained the following clause; "Warranted American property, also warranted not to abandon, if detained or captured, until after a detention of six months, unless previously condemned; nor if refused admittance or turned away, but may proceed to another near open port."

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ceed to another near open port." The vessel, within about 20 leagues of the Isle of Oleron, or the mouth of the Garonne, met a British squadron of five sail, and was boarded by one of the squadron, and informed that all the ports from Russia to the Danubius were blockaded by British ships, and the master was warned, that if he attempted to enter any port under the influence of France, his vessel and cargo would be liable to capture and condemnation by the British; and he was told, that he must either go to England or Malta, or return to America. Not having sufficient water to return to America, the master, after consulting his officers and crew, shaped his course for England, with intention to reach Falmouth, Plymouth, or Guernsey; but springing a leak, and meeting with violent and adverse winds, he was compelled by necessity, for the preservation of the ship, &c., to go into L'Orient, where the vessel and cargo were seized by the French government. It was held, that notwithstanding the existence of the Berlin decree, the ports of France were not to be considered as shut, as it regarded the ship insured; that the terms, near open port, must be understood in a geographical sense; that neither of the English ports was to be considered as a near port to Bordeaux; and that the attempt of the master to reach a port in England was a deviation, which put an end to the policy. (a)

THIS was an action on an open policy of insurance, dated November 19, 1807, on the American ship *Calliope*, from New-York to Bordeaux. The policy contained the following clause: "Warranted American property, proof to be required here only; also warranted not to abandon, if detained or captured, until after a detention of six months, unless previously condemned; nor if refused admittance, or turned away, but may proceed to another near open port."

The cause was tried at the New-York sittings, in December, 1809, before Mr. Justice Yates.

It was proved, that the plaintiff, at the time of the insurance, was the owner of the ship, which was registered in his name, and the register produced at the trial, and her value was proved to the amount of the sum subscribed. In February, 1808, the plaintiff assigned the ship and the policy of insurance to Messrs. *Jumel & Desobry*, who, on the 30th June, 1808, wrote a letter of abandonment to the defendants, in which they state, that they enclosed to the defendants certain letters received concerning the *Calliope*, the policy and proofs of interest, and that, if any other proofs on the subject were wanting, they were ready to furnish them, on the intimation of the defendants. That a total loss having ensued, by reason of the perils insured against by the policy, they thereby abandoned the said ship to the defendants, and claimed a total loss, and offered to execute any assignment to the defendants which they might require. On the 16th August, 1808, *Jumel & Desobry* wrote another letter to the defendants, stating that some doubts existed whether their abandonment on the 30th of June was not premature, and enclosing the information they had received, they again abandoned for a total loss, which had ensued by reason of the perils in the policy, &c. The information communicated consisted of a letter from the captain of the *Calliope*, dated January 1, 1808, at L'Orient, and a letter dated the 6th of March, 1808, from their correspondent at Bordeaux, stating what had occurred, and that the ship had arrived at L'Orient, where she had been seized and put under sequestration by the officers of government, &c. On the 14th October, 1808,

either go to England or Malta, or return to America. Not having sufficient water to return to America, the master, after consulting his officers and crew, shaped his course for England, with intention to reach Falmouth, Plymouth, or Guernsey; but springing a leak, and meeting with violent and adverse winds, he was compelled by necessity, for the preservation of the ship, &c., to go into L'Orient, where the vessel and cargo were seized by the French government. It was held, that notwithstanding the existence of the Berlin decree, the ports of France were not to be considered as shut, as it regarded the ship insured; that the terms, near open port, must be understood in a geographical sense; that neither of the English ports was to be considered as a near port to Bordeaux; and that the attempt of the master to reach a port in England was a deviation, which put an end to the policy. (a)

(a) Vid. *Corp v. United Ins. Co.* 8 Johns. R. 277. *King v. Delaware Ins. Co.* 6 Cranch, 71. *Maryland Ins. Co. v. Woods*, Id. 47.

Messrs. *Jumel & Desobry* addressed another letter to the defendants, enclosing the *protest* of the *Calliope*, made the 1st of *October*, 1808, before a public notary at *New-York*, renewing their abandonment, and demanding payment for a total loss.

From the deposition of the master, read in evidence at the trial, the following facts appeared. The *Calliope* sailed from *New-York* the 29th of *November*, 1807, with a cargo of sugar, cotton, codfish, oil, coffee, logwood and deer skins, and met with heavy gales of wind during her passage, and, on the 28th of *December*, 1807, being about twenty leagues from the island of *Oleron*, she fell in with a squadron of five *British* ships of war, under *the command of Sir *Richard Strachan*, and was boarded by the *Emerald* frigate, one of the squadron, the lieutenant of which asked the master of the *Calliope* if he did not know that the whole continent of *Europe* was blockaded by *British* ships of war, from the *Dardanelles* to *Russia*, and informed him, that if he attempted to enter any port whatever under the influence of *France*, the *Calliope* and her cargo would be subject to capture by any *British* cruiser, and be liable to condemnation, as lawful prize. The following endorsement was then made on the register and sea-letter of the *Calliope*, by the lieutenant of the *Emerald*: "All *French* ports, as well as those under *French* influence, being under a strict blockade, you are hereby warned not to enter any such ports. If found so doing after this warning, you are liable to be seized and sent to *England*, and condemned as lawful prize." On being asked to what port he would go, the master of the *Calliope* answered, that not being permitted to go to *Bordeaux*, he would proceed for *Lisbon*, or some port in *Portugal*. But he was told by the officer, that the *French* were in possession of that country. He then asked to what port it was possible to go; and the officer replied, that he must either proceed to *England* or *Malta*, or return to *America*. The master of the *Calliope* not having a sufficiency of water to return to *America*, it was determined, after a consultation with the officers and crew of the *Calliope*, as there was a strong south-west wind, to proceed for *Falmouth*, *Plymouth*, or *Guernsey*; and they accordingly directed their course for *England*; but the next day the ship sprung a leak and made much water, and the weather was very tempestuous during the 29th and 30th *December*, so that she could carry very little sail. On the 31st of *December*, they experienced violent gales of wind from the west-north-west and west-south-west, with a heavy sea, so that the leak increased; and being *in latitude 47 degrees and 42 minutes north, and 5 degrees west longitude, the master consulted the officers and crew as to what was best to be done, and they were unanimously of opinion that it was absolutely necessary, for the preservation of their lives, and for the interest of all concerned, to abandon the attempt of reaching an *English* port, and to bear away for the first port they could reach in *France*. They accordingly

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bore away for *L'Orient*, as being the nearest port, where they arrived in the afternoon of the 31st of *December*. The ship was ordered to *quarantine*, and, on the 3d of *January*, 1808, the ship and cargo were seized by the officers of government, and seals put on the hatches. The master made a protest before the *American* consul, but did not state his attempt to go to *England*. The ship and cargo continued under arrest, and, on the 9th of *April*, the cargo was landed and deposited in the public stores, subject to the order of the government. On the 4th of *May*, the *Calliope*, under the direction of the officers of government, was completely dismantled and laid up. The master, seeing no prospect of the ship and cargo being released went to *Nantz*, from whence he sailed, on the 12th of *June*, for *New-York*, where he arrived about the 1st of *October*. The master also testified, that he was about twenty leagues from the mouth of the *Garonne* when he was boarded by the *British* frigate, and that, from what he was informed by the boarding officer, as well as from information derived from other sources, while at *L'Orient*, he believed that river to be actually blockaded on the 28th of *December*, 1807, and that no *American* vessel could have proceeded to *Bordeaux*, without great danger, and almost a certainty of being captured by the *British* squadron then stationed off the mouth of the *Garonne*; that he had written instructions from the plaintiff relative to the voyage, and was directed to proceed to *Bordeaux*, consigned to Mr. **Sourde*, of that place; and that, in case it was blockaded, he was directed to proceed to the next near open port, and not to attempt to violate the blockade. That he applied to a *French* merchant at *L'Orient* for his assistance and advice, but who was a stranger to the plaintiff, and he left with him a power of attorney to claim and recover the ship and cargo.

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It was proved by a master of a vessel, that, according to the courses and the winds, as stated by the master in his deposition, the *Calliope*, after being boarded by the *English* frigate, pursued the direct route for *England*, and was in that route when she came opposite *L'Orient*, and that, in the state of the winds at that time, it was impossible to reach *England*, and *L'Orient* was the best and nearest port of safety; that if the *Calliope* had not intended to go to *England*, she would have gone into *Nantz*, having passed that place before she came to *L'Orient*, *Nantz* being much nearer to *Bordeaux* than *L'Orient*.

The counsel for the defendant moved for a nonsuit, 1. Because there was not evidence of an actual blockade of *Bordeaux*; 2. Because there was not a turning away, within the meaning of the policy; 3. Because, before the detention, the voyage had been abandoned, and the underwriters discharged from further risk. The judge granted the motion on the ground that there was not evidence that *Bordeaux* was, in fact, blockaded, at the time the *Calliope* was warned off by the *British* frigate. The counsel then agreed that a verdict should be

taken for the plaintiff, subject to the opinion of the court; and if the court should be of opinion that the plaintiff ought to be nonsuited, then a judgment of nonsuit was to be entered; otherwise a judgment was to be entered for the plaintiff.

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Hoffman, for the plaintiff. The preliminary proofs were sufficient. It was not necessary to show, in the *first instance, that the vessel was still detained, after the expiration of the six months. It is enough that the fact was made to appear at the trial. If the assured cannot abandon, at the end of six months, without proving that the vessel is still detained, it may be 9, 12, or even 18 months, in many cases, before he could exercise this right.

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If there was any evidence of the blockade of *Bordeaux*, it ought to have been left to the jury, for them to decide as to the fact. The plaintiff ought not to have been nonsuited. We contend there was sufficient evidence of a blockade. There was a proclamation, and a squadron of five sail cruising off the port, and the vessel was boarded by one of the squadron, and warned off. There was an absolute turning away from the port, so that the insured were at liberty to enter another near open port; and he was justified in seeking such a near port as he might enter with safety.

T. A. Emmet, contra. 1. The last abandonment was made the 14th *October*, and the defendants were entitled to the original protest of the master, made at *L'Orient*. The preliminary proof does not show that *Bordeaux* was blockaded. It was a mere paper blockade of the whole continent of *Europe*. The prohibition to enter did not regard *Bordeaux* more than any other port. It was general as to all the ports of the continent. The abandonment does not state any particular cause of loss; but speaks generally of a loss by the perils of the sea. To render an abandonment valid, the true cause of loss must be stated. (1 *Johns. Rep.* 191.) How can the insurer act, in consequence of the abandonment, if the precise and true ground of it is not stated? To render the clause requiring preliminary proof useful or operative, the insured ought to set forth the specific causes of the abandonment.

2. There was not evidence of a blockade sufficient *to carry the cause to a jury. The master states, that from what he was informed by the boarding officer, as well as from information derived from other sources, while at *L'Orient*, he believed the *Garonne* to be blockaded. Nothing can be more loose and vague. General rumors of a blockade are not sufficient. Subsequent information at *L'Orient* cannot justify a previous abandonment of the voyage. In *Schmidt v. The United Insurance Company*, (1 *Johns. Rep.* 219.) the master was informed by two different cruisers, at different times, that the *Elbe* was blockaded, and she was warned not to proceed to *Hamburgh*,

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and information of the blockade also existed at *New-York*, and yet this has been considered as very light evidence of an existing blockade. In *Radcliff v. The United Insurance Company*, (*ante*, 98.) it was held that a knowledge of the existence of the blockade should be brought home to the party. There must be either a public notice to the country of the neutral, or notice to the individual. A *turning away*, within the meaning of the clause in the policy, is the act of a *blockading* squadron. A refusal of admittance is the act of the government at the port of destination. Unless there is an actual existing blockade, there can be no turning away, in the sense of the contract between the parties. It must be done by a power having the right to turn away, by the law of nations. There was no warning as to the port of *Bordeaux* being a blockaded port. It was a general warning as to all ports belonging to the enemies of *Great Britain*, from *Russia* to the *Dardanelles*. Such a notice or warning can never be considered as legitimate in this country. But admitting, for a moment, that the *Calliope* was turned away, the master was not justified in going to *England*. He was bound to go to the next open port, or the next port not blockaded. His departure, therefore, for *England*, was an abandonment of the voyage, or a *deviation*.

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**Wells*, in reply. In *Craig v. The United Insurance Company*, (6 *Johns. Rep.* 226.) it was expressly decided, that the protest of the captain was not an essential part of the preliminary proofs. But when the plaintiff, in the letter of abandonment, offered to furnish other evidence, if required, the defendants should have asked for the protest, if they thought it necessary.

It is not requisite to show a blockade in fact. It is enough if the vessel was turned away by a power she was unable to resist. If all the ports in *France* were blockaded, then *Bordeaux* was included. The situation of a *British* squadron cruising off the mouth of the *Garonne*, affords the irresistible inference, that it was there for the purpose of blockading *Bordeaux*. But if it was not a squadron actually stationed for the purpose of a blockade, but cruising on some naval expedition; yet being off the port of destination, and in the very track of the *Calliope*, and she being ordered away under the penalty of capture and confiscation, there was the interposition of that superior force, which justified the master in going to another port. In the case of *Schmidt v. The United Insurance Company*, slighter evidence of a blockade was permitted to go to the jury.

But it is said there was a *deviation*. The insured had liberty to go to a *near open port*. The master was not bound to go to the nearest port. The master might, therefore, exercise his discretion, as to which was a *near open port*. The *Berlin* decree was then in full force. No *French* port, under that decree, could be an *open port* to the *Calliope*, after being

boarded by an *English* ship. An open port is one which may be entered with safety, and where the cargo may be sold and disposed of with security. There was, then, no open port nearer than *England*. The master was forced, by necessity, to go into *L'Orient*; it was not a matter of choice. It would have been folly to have elected to go into a *French* port, with a moral certainty of seizure and *condemnation. The insured was at liberty to go to a near open or safe port; and that port was in *England*.

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SPENCER, J., delivered the opinion of the court. It will not be necessary to consider the points arising from the preliminary proofs and the abandonment; admitting the evidence to have sufficiently established both those points, still the plaintiff is not entitled to recover. Nor is it essential to discuss the point of the blockade, *de facto*, of *Bordeaux*. Whether that port was blockaded or not, the facts show that the *Calliope* was prevented, by the presence of a *British* squadron, from entering the port of destination. There was, therefore, a turning away, within the terms and spirit of the policy, and consequently, there existed a right on the part of the assured to proceed to another *near open port*. The policy precludes an abandonment for refusal of admittance, or a turning away. The questions, then, are, whether the *French* ports in the neighborhood of *Bordeaux* are to be considered open ports, within the purview of the policy; and if so, then, whether the ship did not deviate before her arrival at *L'Orient*.

It was conceded on the argument, very properly, that the *Milan* decree could have no influence on the question, because it was not known to the captain, and he did not act with a view to it. If the ports of *France* are to be considered as not open ports, it must be under the *Berlin* decree. That decree was passed on the 21st of *November*, 1806, and this policy was underwritten on the 19th of *November*, 1807. The only articles of the decree which have any bearing on the question, are the 5th and 7th. The former forbids trading in *English* merchandise; and all merchandise belonging to *England*, or coming from its manufactories or colonies, is declared lawful prize. The latter declares that no vessel coming directly from *England*, or from the *English* colonies, or having been there, after the publication *of the decree, shall be received in any port. The *French* ports, then, were not shut, except as to neutral vessels so circumstanced as to come within the cases mentioned in the decree. When, therefore, we perceive that the voyage is from *New-York* to *Bordeaux*; that the property is warranted *American*; and that the policy was effected one year after the promulgation of the *Berlin* decree, it is certain, that, in the contemplation of the parties, the ports of *France* were not considered shut to this ship. The policy is on the ship, and we cannot intend that the cargo she was to carry out

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would bring her within the decree. On the contrary, the intendment is, that such cargo would be laden on board as was admissible under the decree; the parties acting under a full knowledge of its provisions. With respect to this ship, then, we consider the ports of *France* as open ports.

The terms, *near open port*, must be considered as used in a geographical sense, and not as depending on a facility of reaching a distant port, if the wind should happen to be favorable. They admit of some latitude, but still there must be a limitation. If, therefore, it be conceded, that *L'Orient* comes within the expression of a near open port, in reference to *Bordeaux*, the port of destination, it is, perhaps, as great an extension of the import of the words as ought to be allowed. We are of opinion that neither *Falmouth*, *Plymouth*, nor *Guernsey*, can be considered near ports to *Bordeaux*; and, consequently, that an attempt to reach either of those ports was a deviation, if the ship was wide of the usual course of a voyage from *Bordeaux* to *L'Orient*. That she was out of the common and usual *iter*, is very clear from the evidence; for after she was boarded and had her register endorsed, she set out for *England*, and, during two or three days, was beating against the wind, with a view to reach an *English* port; and when it was determined to abandon the attempt, from the stress of weather and the leaking of the ship, she reached *L'Orient* by putting herself, in fact, before the wind. When the resolution was adopted to abandon the attempt to gain an *English* port, the ship was in latitude 47 degrees 42 minutes north, and in longitude 5 west, and it is perfectly clear, from an examination of the charts, that, at that time, the ship was entirely out of her course from *Bordeaux* to *L'Orient*. Here, then, was a deviation, and, consequently, an end of the policy; and the underwriters are not answerable for the subsequent loss, to whatever cause it may be attributed.

Judgment of nonsuit.

SCHEMERHORN against JENKINS.

The infancy of the plaintiff is not a ground of nonsuit at the trial, but must be pleaded in abatement. (a)

IN ERROR, from the Court of Common Pleas of *Columbia* county. The plaintiff brought an action of assault and battery against the defendant in the court below. The defendant

Such appearance is cured after verdict, by the statute of Jeofails

By pleading in chief, the defendant admits the due appearance of the plaintiff. Error lies on a judgment of nonsuit by a court of common pleas, as it is a judgment with costs. (b)

(a) Vid. *Ex parte Scott*, 1 Cowen, 33.

(b) Acc. *Wilson v. Force*, 6 Johns. R. 110. *Sacia v. De Graaf*, 1 Cowen, 356. Error lies on a judgment of nonsuit, though no costs are awarded. *Lovell v. Evertson*, 11 Johns. R. 52. Error also lies on a repeal of a court of common pleas to nonsuit a plaintiff, when the evidence entirely fails to support his case. *Foot v. Sabia*, 19 Johns. R. 154.

pleaded not guilty. At the trial, it was admitted by the counsel for the plaintiff, in opening the cause, that the plaintiff was under the age of 21 years, and resided out of the county. The defendant moved for a nonsuit, unless a guardian was appointed for the plaintiff. But no guardian being appointed, the court ordered the plaintiff to be nonsuited; and a judgment of nonsuit was accordingly entered.

On the return to the writ of error, the case was submitted to the court without argument.

Per Curiam. The infancy of the plaintiff was not a proper ground of nonsuit at the trial. The defendant should have pleaded that matter in abatement. (1 *Chitty on Pleadings*, 436.) Such an appearance is cured after verdict by the statute of jeofails. The defendant, by pleading in chief, admitted the due appearance of the plaintiff, *and joined issue upon the merits. The plaintiff at the trial could not have been nonsuited, but for want of proof to support the issue on his part. And though error is here brought upon a judgment of nonsuit, yet as it must have been attended with costs against the plaintiff, error will lie, according to the case of *Smith v. Sutts*, (2 *Johns. Rep.* 9.)

Judgment reversed.

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DEY *against* LOVETT and others, Assignees of RICHARDS and COIT, Insolvents.

THIS was an action of *assumpsit*, to recover 451 dollars and 49 cents, being the amount of taxed bills of costs of the plaintiff, who was attorney of the insolvent debtors.

Richards and Coit, the insolvents, in *January* and *February*, 1808, put into the hands of the plaintiff, as their attorney, two bills of exchange, and other demands, on which the plaintiff brought six suits in the Supreme Court. On the 23d of *February*, 1808, *Richards and Coit* became insolvent, and so continued until the 19th *May*, 1808, when they were duly discharged under the act, and their property assigned to the defendants.

On the 16th *June*, 1808, judgments were recovered on the bills of exchange, and the costs taxed; on the 13th *January*, 1809, judgment was entered, and costs taxed in another of the suits; and another suit was at the same time discontinued, by order of *Richards and Coit*, and the costs were also taxed. All the defendants in the said several suits became insolvent,

The costs of suit, mentioned in the 21st section of the act, giving relief in cases of insolvency, (24th sess. c. 131.) do not mean costs arising on suits before instituted by the insolvent; such costs are not entitled to a preference over other debts. (a)

(a) Acc. *Horton v. Hicks*, 12 *Johns. R.* 341. And see *Dayton v. Nicholls*, 10 *Johns. R.* 469.

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and have not paid any part of the debts or costs. On the 23d of *February*, 1810, due notice was given to the present defendants, of the demand of the plaintiff, and before any *dividend was made by them on the estate of *Richards* and *Coit*. A dividend of 25 *per cent.* was, afterwards, in *June*, 1810, made by the defendants. The amount received by the defendants out of the estate of the insolvents, besides the dividend made, is sufficient to pay the costs and charges of the insolvents' discharge, and the demand of the plaintiff.

† 2 R. S. 33.
sec. 15. Id. 46.
sec. 29.

The case was submitted to the court without argument. The plaintiff relied on the 21st section of the act, for giving relief in cases of insolvency, (24th sess. c. 131.) which declares that all costs of suit, prison and gaol fees, and charges of proceedings under the act to obtain the discharge of the insolvent, shall be *first paid* by the assignees, out of the insolvent's estate.

Per Curiam. The costs of suit mentioned in the 21st section of the insolvent act, certainly do not mean the costs arising upon suits before instituted by the insolvent. Such costs are not entitled to a preference any more than other debts. It was, therefore, the proper course for the plaintiff, to have presented his bills of costs for liquidation, in the mode pointed out by the act, and to come in for his dividend along with the other creditors. Until he has done this, and the defendants have refused him his dividend, it would seem that he has no right of action against the assignees. But as this case contains some agreement or stipulation on the subject, it is sufficient for the court to have decided the point submitted, and to leave the suit to be afterwards adjusted according to the case.

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*SEDGWICK *against* HOLLENBACK.ALBANY,
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THIS was an action of covenant. The declaration stated, that the defendant, by his deed, dated the 14th of *July*, 1807, in consideration of 800 dollars, granted, bargained, sold and conveyed to the plaintiff a piece of land, &c., and in and by the said deed covenanted with the plaintiff, that the defendant was well *seised*, &c., and had good right to sell, &c., and that the plaintiff should from time to time, and at all times thereafter, peaceably and quietly have, hold, occupy, possess and enjoy the said premises with the appurtenances, as above granted and bargained; and the defendant further covenanted, that he would *warrant* and defend the premises, &c. The plaintiff assigned as breaches, 1. That the defendant was not *seised*, &c.; (in the words of the covenant;) 2. That he had not power to sell, &c.; (in the words of the covenant;) 3. That the defendant had not, from time to time, and at all times after the making the said deed, hitherto peaceably and quietly had, held, &c. the said premises with the appurtenances, without any let, &c., but that, on the contrary, the defendant, on the 10th of *October*, 1808, disturbed and hindered the plaintiff in the use, occupation, &c. of the premises, and the defendant did put and cause to be put into possession of the premises divers persons and their families, to wit, &c., and ejected and amoved the plaintiff from the use and occupation, and possession, &c.; 4. That the defendant hath not warranted and defended the premises, &c.

Plea, to the first and second breaches, that the defendant was *seised*, &c., and had proved to sell, &c.

*First *plea* to the third and fourth breaches, that after the making the deed, &c., to wit, on the 14th of *July*, 1807, the plaintiff executed a mortgage to the defendant, of the premises, for securing the payment of the sum of 1,000 dollars, 300 dol-

In an action of covenant on the covenants contained in a deed of *seisin*, *power to sell*, *quiet enjoyment*, against *encumbrances* and *warranty*; it was held, that the breaches in the declaration were well assigned in the words of the covenants, (a) that an entry by the covenantor himself tortiously and without title, is a breach of the covenant for quiet enjoyment, (b) that a breach of the covenant of *warranty* is bad, if it does not state an *eviction*. (c)

Where the plaintiff alleged that the defendant was not *seised*, &c., and the defendant pleaded that he was *seised*, &c., and the plaintiff

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replied, that he was not *seised*, because one *W. B.* at the time was *seised* of three undivided

seventh parts of the premises, this was held a good assignment of a breach of the covenant, for it shows that the defendant was not *seised* absolutely in fee of the whole right. (d)

But the stating an outstanding mortgage and a judgment, at the time of the covenant, without averring a foreclosure or possession under the mortgage, is not alleging a sufficient breach of *seisin*, (e) and a judgment of itself does not transfer the title, or destroy the *seisin*. (f)

(a) Vid. *Abbott v. Allen*, 14 *Johns. R.* 248. *Potter v. Bacon*, 2 *Wendell*, 583. *Day v. Chism*, 10 *Wheat.* 449.

(b) Vid. *Dyett v. Pendleton*, 8 *Coven*, 727. *S. C.* 4 *Coven*, 581. There must be an actual ouster of possession to support an action for breach of covenant for quiet enjoyment. *Kerr v. Shaw*, 13 *Johns. R.* 236. *Lansing v. Van Alstyne*, 2 *Wendell*, 563, note. *Van Slyck v. Kimball*, 8 *Johns. R.* 198.

(c) *Supra*, 258, note a.

(d) Vid. *Lansing v. Van Alstyne*, 2 *Wendell*, 561.

(e) For the mortgage is *seised* until foreclosure. *Rumyan v. Mercereau*, 11 *Johns. R.* 504. *Astor v. Hoyt*, 5 *Wendell*, 603. *Collins v. Torrey*, *sup.* 278.

(f) But an outstanding judgment against the grantor, is a breach of a covenant against *encumbrances*. *Hall v. Dean*, 13 *Johns. R.* 105. Vid. *Jackson v. Hoffman*, 9 *Coven*, 271.

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lars on the 1st of *March* next ensuing, 400 dollars on the 1st of *November*, 1808, and 300 dollars on the 1st of *November*, 1809, with interest, &c., and did, in and by the said mortgage, authorize and empower the defendant, in case of default in the payment of the said sum of 1,000 dollars, or any part thereof, to enter upon and take possession of the said premises; and the defendant averred that the plaintiff did make default, to wit, in the payment of the said sum of 300 dollars on the 1st of *March*; and the defendant on the 10th of *October*, 1808, did, in consequence, enter into the premises, and put *T.* and *A.* into the possession thereof as his tenants, who have ever since kept the possession thereof; and that, ever since the 14th of *July*, 1807, until the said 10th of *October*, the defendant did warrant and defend the said premises to the plaintiff, according to the said covenants, &c., and this he is ready to verify, &c.

Second plea to the third and fourth breaches: that the plaintiff, on the 14th of *July*, 1807, mortgaged the said premises to the defendant, to secure the said sum of 1,000 dollars, &c., and did, by the said mortgage, authorize and empower the defendant, his heirs and assigns, in case of the non-payment of the said sum, &c., to grant, bargain and sell the said premises at public auction, pursuant to the statute, &c., and that the plaintiff having made default, &c., the defendant did, on the 6th of *November*, 1807, assign and transfer the said mortgage to *William Shute*, for the consideration of the principal and interest due thereon; and that the plaintiff having made default in the payment, &c., the said *William Shute* did sell the said premises at public auction, pursuant to the said power, &c., according to the statute, &c., unto the defendant, for the consideration of, &c., by *reason whereof the defendant entered into the premises, on the 10th of *October*, 1808, and put the said *T.* and *A.* in possession, &c. as his tenants, &c., and that, ever since the 4th of *July*, 1808, the defendant did warrant and defend, &c.

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Third plea to the third and fourth breaches: that the plaintiff, on the 14th of *July*, 1797, mortgaged the premises to the defendant, and the plaintiff having made default in the payment of the money according to the condition, &c., the defendant, by virtue of the mortgage, entered, &c. on the 10th of *October*, 1808, &c.

Replication to the plea to the first and second breaches: that the defendant was not seised, &c., because, at the time of the sealing and delivery of the said deed, the heirs of *William Bates* were seised, &c. of three equal and undivided seventh parts of the premises; and because, previous to the said deed, to wit, on the 8th of *January*, 1805, the defendant had mortgaged the premises to *V. Kingsley*, for securing the payment of 2,300 dollars, &c., and which mortgage remained unsatisfied at the time of the giving of the deed by the defendant to the plaintiff; and because, before the said deed of the

defendant to the plaintiff, to wit, on the 6th of *March*, 1806, there was a judgment in this court against the defendant in favor of *J. B. Eves* and *S. Whiston*, for 6,328 dollars and 86 cents, and at the time of the said deed remained unsatisfied, &c., and this he is ready to verify, &c.

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Replication to the *first* plea to the third and fourth breaches: that though the plaintiff did give the mortgage to the defendant, &c., yet the defendant, before his entry, &c., to wit, on the 6th of *November*, 1807, assigned the mortgage to *William Shute*, &c., and this he is ready to verify, &c.

Replication to the second plea to the third and fourth breaches: that the plaintiff did give the mortgage, &c. to the defendant, &c., and the defendant did assign it to *William Shute*, &c., but the plaintiff denies that the defendant *did, on the 8th of *April*, 1808, or at any other time, before his entry, &c., purchase of the said *William Shute* the said premises, &c., and this he prays may be inquired of by the country, &c.

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Replication to the third plea to the third and fourth breaches: that the plaintiff did mortgage, &c., to the defendant, as stated, &c., yet that, before the entry of the said defendant, to wit, on the 6th of *November*, 1807, the defendant did assign the said mortgage to *William Shute*, &c., and this he is ready to verify, &c.

There was a *special demurrer* to the *replications*, and the following causes were assigned: 1. Because the replication to the plea to the first and second breaches, after denying the whole plea, proceeds argumentatively to state and allege a number of supposed facts, to maintain the traverse, and sets forth three distinct facts, which, if put in issue, must be tried by different tribunals; and it concludes to the court, and not to the country. 2. That the replication to the first plea to the third and fourth breaches neither confesses and avoids, nor traverses and denies the said plea, but leaves it unanswered; that the plea states a power to sell contained in the mortgage, and the right to enter, and the default of the plaintiff, and the defendant does not reply to these facts, nor does he reply to the fact, that until the entry, &c., the defendant did defend, &c. 3. That the replication to the second plea to the third and fourth breaches, does not answer the allegations that the mortgage contained a power to sell, and that the plaintiff made default, &c. 4. That the replication is *double*, as, after confessing and avoiding a part of the said second plea to the third and fourth breaches, and taking issue on certain other parts of the said plea, and concluding to the country, it further states part of the same facts so confessed and avoided, by alleging that the said mortgage was assigned to *William Shute*, and concludes to the court. 5. That the said replication wants certainty, as it does not appear to which of the said pleas the last replication was intended to relate.

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*There was a *joinder in demurrer*; and the cause was submitted to the court without argument.

Per Curiam. The three first breaches in the declaration are well assigned. The two first are in the words of the covenant, and the third states, that the defendant himself entered and evicted the plaintiffs. In the case of a covenant for quiet enjoyment, an entry by the covenantor himself, tortiously and without title, is a breach. This was the doctrine in *Corus's* case, (*Cro. Eliz.* 544. 1 *Roll. Abr.* 430. pl. 11.) and it was very pointedly and strongly laid down in *Crosse v. Young*, (2 *Show.* 415.) But as the fourth breach, which was upon the covenant of warranty, does not state any eviction whatever, it is clearly bad, and it will be found that this defect was not cured by the replication.

The pleas were good and sufficient, and the next inquiry is respecting the replication.

The replication to the plea to the first and second breaches, assigns specially a breach in stating that the heirs of *Bates* were seised of three sevenths of the premises in fee. This was a good assignment; for if the defendant was not seised absolutely in fee of the whole right in the premises, his covenant was not true. He goes on and states two outstanding encumbrances, a mortgage and a judgment, and the question is, whether these were breaches of the covenant of seisin. He does not aver that the mortgage was foreclosed, or possession given, and until then the mortgagor is considered as seised, according to the doctrine of this court. A judgment is of itself no transfer of title, nor does it destroy the seisin of the defendant. So far the replication was filled with immaterial matter, and bad on special demurrer. The replication to the other pleas is bad in substance. It does not meet the fact charged of a lawful entry by the defendant under the title of the mortgage. Every fact in the replication to the first, second and third plea to the third and fourth breaches, may be true, and yet the defendant may have lawfully entered under the mortgage. The defendant is, therefore, entitled to judgment upon the whole record; for the fourth breach is bad in substance, the replication to the plea to the first and second breaches is bad in form, and the replication to the other pleas is bad in substance.

Judgment for the defendant, with leave to amend on payment of costs.

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IN ERROR, on *certiorari* from a justice's court. *Heyden* sued *Dunham* before the justice, by summons returnable the 17th *February*, 1810. The plaintiff below declared against the defendant, as bail of one *Whitehead*, who had been taken by *warrant* and brought before a justice, on the 16th *June*, 1809, to answer to the plaintiff; and after issue joined, *Whitehead* prayed for an adjournment, and thereupon *Dunham* became security for his appearance on the 30th *June*, 1809, at which time the plaintiff appeared, but *Whitehead* did not appear, and a judgment was rendered against *Whitehead*. To this declaration *Dunham* pleaded the general issue. *Heyden* prayed for an adjournment of the trial, and made oath that he could not safely proceed to trial for want of a material witness, then absent from the county; and the justice adjourned the trial to the 27th *February*. At that day, the parties being called, *Heyden* answered, but *Dunham*, though present, refused to answer or to proceed in the cause. A witness was then called and examined on the part of the plaintiff, and proved the fact, as stated by *Heyden* in his declaration. *Dunham* then cross-examined the witness, who was the justice who issued the warrant against *Whitehead* and took the security; and *the witness testified, that *Dunham* appeared on the day appointed, in behalf of *Whitehead*, who was out of the county, and the next day after the trial and judgment against *Whitehead*, *Dunham* offered to deliver him up to the justice, who answered that he had nothing to do with him; neither the plaintiff nor the constable who served the warrant being present, when the offer of surrender was made.

The justice gave judgment against *Dunham*, for 22 dollars and 42 cents, with costs.

Per Curiam. The first exception is, that the justice adjourned the cause from the 17th to the 27th of *February*, at the instance and on the oath of the plaintiff below, that he could not safely proceed to trial for the want of a material witness then absent from the county.

The only authority to adjourn, unless at the instance of the defendant, is contained in the 2d section of the act, and such adjournment must not exceed six days. In the present case, however, the defendant below appeared on the day to which the cause was adjourned, and cross-examined the plaintiff's witness; this cured the irregularity of the adjournment. It would be unjust and extraordinary to reverse a judgment after

A justice cannot adjourn the trial of a cause at the instance of the plaintiff, for more than six days; but where a justice, at the request of the plaintiff, adjourned a cause for ten days, and the defendant appeared and examined a witness, it was held to be a waiver of the irregularity. (a) Where a person is brought before a justice on a warrant, and prays for an adjournment, and bail is taken for his appearance at the day, there must be a per-

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sonal appearance of the party, and not by attorney, otherwise, the bail will be liable for the amount recovered by the plaintiff. (b)

(a) *Vid.* *Kilmore v. Sudum*, *inf.* 529. *Willoughby v. Carleton*, 9 *Johns. R.* 136. *Kittle v. Baker*, *Id.* 354. *Hill v. Downer*, 11 *Johns. R.* 461. *Richardson v. Brown*, 1 *Cowen*, 255.

(b) *Vid.* *Charles v. Hyatt*, 1 *Cowen*, 253.

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a trial on the merits, by listening to an objection, which the party himself had waived by his voluntary appearance. It is not like the case where the defendant makes oath that he cannot safely proceed to trial for the want of a material witness, and where he is improperly forced to trial, without the testimony to which he is entitled.

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The foundation of the demand of the plaintiff below was, that the defendant below had become security for one *Whitehead*, who had been taken on a warrant at the suit of the plaintiff below; it was shown by the record of the justice before whom *Whitehead* had been sued, that the security was for the appearance of *Whitehead*, agreeable to the requisition of the statute, and that he *did not appear on the day appointed, personally, but appeared by attorney, and a trial was had and judgment rendered against *Whitehead* for 20 dollars and 97 cents. On the day after the judgment, the defendant below offered to render *Whitehead* to the justice, who refused to have any concern with him.

The question is, What is the effect of an undertaking for the appearance of a defendant on a warrant? Must it be a personal appearance, or may it be by attorney?

We think the appearance mentioned in this section must mean a personal appearance. Where the act gives the process by warrant, it is where either the defendant is without a family or a freehold, or where the plaintiff is a non-resident; and in the latter case, the trial is to be within three days, and the giving security is not required.

The warrant is intended, except in the single case of a non-resident plaintiff, as a means to prevent the escape of the defendant, and as a security for the plaintiff's demand; if, then, the defendant, on whose person the plaintiff has a lien, can appear by attorney, he frustrates the plaintiff's demand.

We have a right to consider the word appearance, in reference to the rights of the plaintiffs, and with a view to give effect to the intention of the legislature, as a personal appearance.

On the whole, the judgment must be affirmed.

THE PHENIX INSURANCE COMPANY *against* FIQUET.

In an action
[* 384] THIS was an action of *assumpsit*, brought against the defendant, as the endorser of a promissory note made by *James brought by insurers against the endorser of a promissory note, given to secure the payment of the premium on a policy of insurance, the insurers, before the commencement of the suit, having become liable to pay the insured, who was the maker of the note, a return of premium on the same policy; it was held, that the defendant was entitled to have the amount of such return of premium deducted from the amount of the note, notwithstanding the maker was, at the same time, indebted to the insurers for other notes given for premiums on other policies of insurance, and had become insolvent. (a)

(a) *Vid. Frisbee v. Hoffnagle*, 11 Johns. R. 50.

Vidalot. A verdict was taken, by consent, in favor of the plaintiffs, for 3,532 dollars and 8 cents, subject to the opinion of the court on the following case. The note in question was delivered by *Vidalot* to the plaintiffs, to secure the premium of insurance upon a certain vessel, upon which the plaintiffs were insurers. Before this note became payable, *Vidalot*, the maker, became insolvent; and then was, and yet is, largely indebted to the plaintiffs for notes, given for premiums of insurance on other vessels, but upon which notes the defendant is not an endorser. Prior to the commencement of this suit, the plaintiffs became liable to pay a return of premium on the same policy, for the premium on which the note in question was given.

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The defendant insisted, that the amount of such return of premium ought to be allowed to him, in part payment of the note on which the present suit is brought. The plaintiffs contended, that they had a right to enforce the payment of the whole note against the defendant, and to pass the amount of the return of premium to the credit of *Vidalot*, generally, in account. The policy contained the following clause: "But in case of loss, the assured is to abate two *per cent.*, and such loss to be paid in thirty days after proof of loss, and proof of interest in the said assured, the amount of the note given for the premium, if unpaid, being first deducted."

It was agreed, that if the court should be of opinion that the amount of the return of premium should be applied in favor of the defendant, in *part payment* of the note in question, then the same, with interest, should be deducted from the amount of the verdict: but if the court should be of opinion, that the amount of the return of premium ought not to be allowed to the defendant, in part payment of the said note, then the verdict was to stand.

T. A. Emmet, for the plaintiff.

Hoffman, contra.

**Per Curiam.* The note in question was given for the premium of insurance; and it is admitted that the plaintiffs are not now entitled to so much premium as the note was given for. If they are bound to return part of the premium, they are not entitled to the face of the note. The consideration of a note may be inquired into between the original parties. The defendant may show that the note was given for more than the plaintiff was entitled to. (*Cole v. Gower*, 6 East, 110.) The consideration for the note was the premium of insurance, and the only question is, What was the amount of that premium? If the plaintiffs are bound to return part, then the premium really and ultimately due is not as much as was at first understood to be. It is most just and reasonable, that it should be

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deducted from the face of the note, in this suit ; for the surety is not further bound than his principal, and is entitled to the same defence. The return premium must, accordingly, be deducted from the verdict.

COIT and PIERPOINT *against* THE COMMERCIAL INSURANCE COMPANY.

any of the terms used in a policy of insurance have, by the known usage of trade, or by use and practice, as between assurers and assured, acquired an appropriate sense,

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they are to be construed according to that sense. (a)

Parol evidence is admissible to show, that by the general usage, among merchants and underwriters in New-York, the word *roots*, first inserted in the New-York policies in 1787, is confined to such roots as are perishable in their own nature; and that *sarsaparilla* is not a root perishable in its nature, or included under that term, in the memorandum in the policy. (b)

THIS was an action on a policy of insurance, dated 29th of September, 1807, on 45 bales of *sarsaparilla*, specified in the margin of the policy, on board of the ship *Paragon*, "at and from New-York to Amsterdam, upon sea-risk only, including sea-risk during capture or detention," at a premium of 5 per cent.

The policy contained a printed memorandum in the following words: "It is also agreed, that salt, grain of all kinds, tobacco, Indian-meal, fruits, (whether preserved *or otherwise,) cheese, dry fish, vegetables and roots, and all other articles, perishable in their own nature, are warranted by the assured, free from average, unless general; hemp free from average under twenty per cent. unless general; and sugar, flax, flax seed, bread, skins and hides are warranted, by the assured, free from average under seven per cent. unless general; and coffee in bags or bulk, and pepper in bags, free from average under ten per cent. unless general."

The cause was tried at the New-York sittings, the 20th December, 1809, before Mr. Justice Yates.

The action was brought to recover the amount of a partial loss occasioned by sea-damage. It was admitted by the plaintiffs that *sarsaparilla* was a *root*, within the general meaning of the term; and the only question between the parties was, whether *sarsaparilla* was to be considered a *root within the memorandum* in the policy.

The plaintiffs offered to prove, that although *sarsaparilla* is a *root* within the general meaning of the term, yet that it had never been considered, either by merchants or underwriters, as a root within the memorandum of the policy; and that the term "*roots*" was first inserted in the New-York policies, in or about the year 1787; that it was then inserted with a view of exempting the underwriters from partial losses on *onions, beets, &c.*, being *roots* perishable in their own nature. and in particular reference to an extensive trade in those articles, then car-

(a) Acc. *Astor v. Union Ins. Co.* 7 Cowen, 202. And see *Wadsworth v. Pacific Ins. Co.* 4 Wendell, 35. *Coggeshall v. American Ins. Co.* 3 Wendell, 283.

(b) Evidence of usage has never been considered within the rule which precludes the admission of parol testimony to vary or contradict a written instrument. *Renard v. Bank of Columbia*, 9 Wheat. 581. But see *Turner v. Burrows*, 5 Wendell, 541.

ned on between the *New-England* states and the *West-India* islands; that since the insertion of the term "roots," in the *New-York* policies, the *usage* has been to consider the term as exclusively confined to roots perishable in their own nature. They further offered to prove, that *sarsaparilla* was not a root perishable in its own nature; and also that if the words, "free from particular average," had been inserted in lieu of the memorandum in the policy, five *per cent.* would have been an exorbitant premium.

*The evidence offered was objected to by the counsel for the defendants, who moved for a nonsuit. The judge overruled the evidence, and granted the motion for a nonsuit, which was accordingly entered.

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Brinkerhoff, for the plaintiff. The question is, whether *sarsaparilla* is a root within the meaning of the memorandum in the policy. Though it is a *root*, according to the general sense of the word, yet it is not a root *perishable in its own nature*. The object of the memorandum was, to guard against claims for trivial losses on *perishable* articles; and, according to the grammatical construction of the clause, the word *roots* is qualified by the terms *perishable in their own nature*. Though the article insured be a root, yet if it is not perishable in its own nature, it is not within the meaning or words of the memorandum.

The insurance is against *sea-risks* only; and if a particular average is wholly excluded, then the plaintiffs could recover only in case of an absolute total loss, or of a general average. But can it be supposed, that they would have given a premium of 5 *per cent.* to be insured against *sea-risks* only, if they were not to recover for any particular averages whatever?

Again, the plaintiffs ought to have been allowed to show the usage and mercantile understanding, as to the meaning of the memorandum. In the case of *Scott v. Bourdillion*, (5 *Bos. & Pull.* 213. *Park*, 40. 159. 161.) evidence of usage was admitted, to show that *rice* was not *corn*, within the meaning of the memorandum. In the case of *Sleght v. Rhinelander*, (1 *Johns. Rep.* 192. 2 *Johns. Rep.* 531.) parol evidence was admitted, to explain what was a *sea-letter*, as used in the warranty.

Wells, contra. The general rule of law, in regard to admitting parol evidence to explain a written contract, is well settled. Commercial contracts are said to be an exception to the general rule, and open to explanation *by evidence of usage; and courts in *England* have certainly gone great lengths in admitting such evidence. But in the case of *Anderson v. Pitcher*, (2 *Bos. & Pull.* 168.) Lord *Eldon* thought it was to be lamented, that parties had not been left to explain their own meaning by the terms of the instrument; and he observed, that the inclination of his mind was, to adhere to

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the letter of the contract. The oldest cases in which this kind of evidence has been admitted, are *Lethulier's* case, (2 *Salk.* 443.) and *Gordon v. Morley*, (*Stra.* 1265. See also 2 *Salk.* 445.) but in the former case, Lord *Holt* dissented. The modern cases in *England*, which support the admissibility of such evidence, are since our revolution; and if the rule is found to be a bad one, our courts are not bound by any authority to adhere to it. They are at liberty to do what Lord *Eldon* said he was disposed to do, if it were *res integra*, adhere to the letter of the contract.

The decision in *Scott v. Bourdillion* was not in contradiction to the contract. *Corn* is a genefal term in *England*, and it was proper to admit evidence to show what grains were included under that term. But suppose *rice* had been specified, would evidence have been admitted to show whether it was perishable or not? In *Baker v. Ludlow*, (2 *Johns. Cas.* 289.) it was decided in this court, that the words, "all other articles perishable in their own nature," are not applicable to the articles previously enumerated. Salt and tobacco are enumerated; and would evidence be admitted to show that they were not perishable articles? The rule is, that where an article is specified, the general clause is restricted and regulated by the specification. If not specified, then evidence may be received, to show whether it is an article perishable in its own nature.

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The true construction of the clause is, that all the articles specifically enumerated, and, also, all other articles which are perishable in their own nature, shall be free of average, &c. On the construction contended for by *the plaintiff, it would read "roots, and all other roots perishable in their own nature," &c.

The case of *Sleght v. Rhineland* related to a question of fact, whether a particular paper was a sea-letter or not, and is very different from the present. To allow evidence of usage in this case, would be making a new contract between the parties.

Brinkerhoff, in reply. The counsel for the defendants admit, that by the rule, as established in the *English* courts, such evidence is admissible. That rule existed before the revolution, and is binding here. *Park* says, no rule has been more frequently followed than the usage of trade, and that the judges have always called in the usage of trade, as the ground of deciding on the construction of the policy, in regard to the particular voyages or risks to which it relates. *Sarsaparilla* is an article as imperishable as mahogany, or the hardest wood; and it never could be the intention of the memorandum to include articles of that nature.

Per Curiam. The plaintiffs offered the strongest proof that could be given of a mercantile usage, settling the meaning and

extent of the term *roots*, in the memorandum of the policy, and that it did not apply to the subject in question. The only point then is, whether usage is admissible at all, to control the ordinary and popular sense of the term.

The case of *Baker v. Ludlow* (2 Johns. Cas. 289.) says, that the words in the memorandum, "all other articles perishable in their own nature," were not applicable to the articles previously and specifically enumerated. But that case does not decide the question, how far usage is admissible to explain the sense of the contract; though evidence of usage was there admitted without objection.

*The law has been too long settled to be now questioned, that if any terms in a policy have, by the known usage of trade, or by use and practice, as between assurers and assured, acquired an appropriate sense, they shall be construed according to that sense and meaning. (*Mason v. Skuney*, 1 Marsh. 143. 4 East, 135. 6 East, 207. 5 Bos. & Pull. 213.) This is not only the modern rule, as to mercantile instruments in general, (*Doug.* 654.) but it appears to have been the established practice, as far back as the time of Ch. J. Rolle, and of Lord Holt. (*Pickering v. Barkley*, 2 Roll. Abr. 248. pl. 10. Sty. 132. *Lethulier's case*, 2 Salk. 443.) And though Lord Eldon, in the case of *Anderson v. Pitcher*, (2 Bos. & Pull. 168.) regretted the rule, yet he admitted that it was too late to question its force, and that policies must be expounded with due regard to the usage of trade. To reject this testimony now would produce the greatest injustice, for the contract must have been made and understood, at the time, by the parties, in reference to this mercantile and particular meaning of the terms employed.

The nonsuit ought, therefore, to be set aside, and a new trial awarded, with costs to abide the event of the suit.

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GIBSON against COLT and others.

THIS was an action on the case. The declaration stated that the defendants, on the 30th of December, 1808, were the

Where the
owners of a ship
authorized the
master to sell

the ship in the same manner as they themselves might or could sell her; and the master sold the ship, and at the time of sale represented to the vendee that she was a registered ship, when, in fact she only sailed under a coasting license, it was held that the master being a special agent for the purpose of the sale, the owners were not answerable for the false representation of the master, who exceeded his authority. (c)

A power to sell does not, of itself, give the power to warrant the title of the thing sold.

(a) The liability of a principal depends, 1st, upon the fact, that the act was done in the exercise of the power delegated, and 2d, that it was done within its limits. *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 396. And see *Mum v. Commission Co.* 15 Johns. R. 44. *Beals v. Allen*, 18 Johns. R. 363. *Perkins v. Washington Ins. Co.* 4 Cowen, 645. *Andrews v. Kneeland*, 6 Cowen, 354. *Jaques v. Todd*, 3 Wendell, 91, with regard to the powers of general and special agents. Where a special agent exceeds his authority, not only he but those employed by and acting under him, though they are ignorant of the conditions annexed to the authority, are liable over to the principal. *Bradt v. Walton*, 8 Johns. R. 298.

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owners of the ship *Columbia*, of which *Levi Goodrich* was master, and also the factor and agent of the defendants, by them generally authorized to sell the ship to any person in the same manner as they themselves might and could make sale, &c. That *the plaintiff bargained at *Charleston* with *Goodrich*, being such agent, &c., for the purchase of the ship; and while bargaining, the said *Goodrich* did deceitfully and falsely affirm to the plaintiff that the ship was a *registered* vessel, according to the act of Congress, entitled, "An Act concerning the registering and recording of Ships or Vessels;" and the plaintiff, giving faith to such false and fraudulent representation, agreed to purchase the ship for 10,000 dollars, to be paid by the plaintiff to the said *Goodrich*, as such factor and agent, in bills of exchange, drawn on *Gillespie & Campbell*, at *New-York*, and payable in 4 and 6 months; and the said *Goodrich* deceitfully and falsely sold the ship as aforesaid, and the plaintiff purchased and paid as aforesaid; whereas, in fact, at the time, the ship was *not registered* according to the act aforesaid; but was a *licensed coasting vessel only*, which the said *Goodrich* well knew, &c. That the plaintiff, after such purchase, to wit, on the 12th *January*, 1809, at *Charleston*, *freighted and chartered the ship* to *James Chapman*, for a voyage to *New-York*, with a cargo of cotton and rice, and from thence to *Europe*. That the said *Chapman* loaded the said ship with the cargo aforesaid, but by reason that the said ship was not a registered vessel, within the meaning of the act aforesaid, she could not legally perform the voyage aforesaid, according to the terms of the charter-party; whereby the plaintiff was compelled to pay to the said *Chapman* 5,000 dollars, by reason of such inability, &c. To this declaration there was a general *demurrer* and *joinder*.

Foot, in support of the demurrer. A general power to sell does not make the principal answerable for the fraud of the agent. (*Cro. Jac.* 468. *Southern v. How.*) Where a special agent exceeds his authority, he cannot bind his principal. (3 *Term Rep.* 757.) This doctrine has been established by numerous decisions. (2 *Roll. Rep.* 270. 226. *Spencer*, 228. *Roll. Abr.* 95. 10 *Mod.* 111. 2 *Salk*, 442.)

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*The fraud charged in this case, is in affirming that the vessel was a registered vessel, when the agent knew she had only a coasting license. By the register act of the 31st *December*, 1792, (2d sess. 2 Cong. c. 1. *Laws*, vol. 2. 131.) ships registered by virtue of the act for registering and clearing vessels, regulating the coasting, &c., as well as those thereafter to be registered, under the "Act concerning the registering and recording of Ships or Vessels," are declared to be ships and vessels of the *United States*, and entitled to all the benefits and privileges belonging to such ships or vessels. Whether the vessel, therefore, was registered or not, was perfectly immaterial; she was

equally an *American* vessel. It was a deceit without injury. The plaintiff might have obtained a register whenever he pleased; for whenever a sale takes place, a new register is to be taken out. As this was a coasting vessel, the plaintiff might, if he wished to send her to a foreign port, have surrendered the license, and taken out a register. The owner of a vessel may surrender his license and take out a register, and change them, as often as he changes the employment of his vessel.

Again, the plaintiff had equal means of knowing the truth of the fact, as the seller, in this case; for it would have appeared from the ship's papers, which are supposed to be with her; and the register is required to be inserted in every bill of sale, in order to preserve the character of the vessel. The plaintiff ought, then, in common prudence, to have examined the ship's papers.

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T. A. Emmet, contra. In *Bayard v. Malcolm and another*, (1 *Johns. Rep.* 454. 2 *Johns. Rep.* 550.) it was held that the representation of a partner and agent was binding on his co-partner, and the plaintiff recovered. A principal is clearly answerable for the fraud of his agent when acting within the scope of his authority. In *Hern v. Nichols*, (1 *Salk.* 289.) Lord Holt said that *the merchant was answerable for the deceit of his *factor* beyond sea.

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The papers do not always accompany the vessel. By the law of the *United States*, (1st sess. 5th Cong. s. 63.) a vessel, when she arrives in port, must deposit her register, or license, and other custom-house documents, with the collector, where they are to remain until her departure. (*Laws*, vol. 4. p. 384, 385.) This sale may have taken place while the vessel was lying in *Charleston*; how then was the purchaser to know how she was documented; or how could he inspect her papers? Again, vessels, licensed as coasters, cannot obtain a register out of the district in which they are licensed.

Hopkins, in reply. To sustain an action, there must be *damnum cum injuria*. Here no injury or damage is shown. No law is better laid down than the distinction between the liability of a principal for the acts of a general or a special agent. A general agent is usually constituted by parol, and is known by his general concern in the business of his principal, and there is a power necessarily implied by such an agency to make representations. A special agent acts under a special delegation; and it is the duty of the person who deals with him to look to his power. If he goes beyond it, his principal is not bound. Every thing depends on the terms and extent of the special authority delegated. (*Godbolt*, 361. 2 *Roll. Rep.* 270. *Cro. Jac.* 468. 2 *Roll. Rep.* 28. 3 *Term. Rep.* 757.) In *Nixon v. Hyserott*, (5 *Johns. Rep.* 58.) this doctrine was recognized, and the court held that a power to sell and ex-

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ecute a deed, did not give an authority to bind the principal by any covenants of *seisin*, &c., or warranty.

Per Curiam. The agent of the defendant is stated to have been specially authorized by them to sell the ship in the same manner that they themselves might have sold her. This is all the authority given, and *Goodrich* was consequently *nothing more than a special agent constituted for that particular end. The plaintiff was, therefore, not to know or infer any authority beyond what was given, and if the agent exceeded that authority when he made the representation in question, his principals were not bound. This distinction between a special and general agent was laid down in the case of *Fenn v. Harrison*, (3 Term Rep. 757.) and it is founded on just and reasonable principles. The limitation to the powers of a general and known agent cannot be known, unless specially communicated, and third persons ought not to be affected by any private instructions. *Goodrich* certainly exceeded his power to sell when he made the false affirmation and representation charged by the plaintiff. A power to sell does not of itself convey a power to warrant the title. This was so decided in *Nixon v. Hyerott*, (5 Johns. Rep. 58.) The remedy for the plaintiff lies against the agent, and not against the defendants. The defendants are, therefore, entitled to judgment.

Judgment for the defendants.

JACKSON, *ex dem.* HOWARD and others, against
HOLLOWAY.

A. having made his will, duly executed, devising all the lands of which he was then in possession, to his four sons; and having afterwards

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become seised of other lands, he altered his

will, by erasures and interlineations, so as to make the devise extend to all lands of which he should die seised; and endorsed a memorandum to that effect on the will, stating the alterations which he had made; but the memorandum was attested by two witnesses only; it was held, that the erasures and interlineations did not destroy the original devise; but that the alteration not being attested by three witnesses, could not operate; and the lands acquired subsequent to the date of the devise, descended to the heirs at law. (α)

(α) Acc. *Jackson v. Potter*, 9 Johns. R. 313, and see 2 R. S. 57, sec. 5. There must be a cancellation *animus revocandi*, in order to make it operate as a revocation. *Den v. Brown*, 4 Cowen, 483. And a codicil, though it profess an intention to dispose of the estate in a manner different from the disposition in the will, if it only do so in part, is but a revocation *pro tanto*. *Brent v. Wilson*, 8 Cowen, 56. The parol declarations of a devisee will not amount to a revocation of a will of lands. *Den v. Brown*, ubi sup. See further as to this subject, *Jackson v. Betts*, 6 Cowen, 377. S. C. 9 Cowen, 208. S. C. in error, 6 Wendell, 173. 2 R. S. 64, sec. 48.

The lessors are the four daughters of the ancestor, who are yet living, and the heirs of the two deceased daughters; and as such, they claim *six tenths* of his real estate.

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The ancestor, *William Holloway*, being seised of part of the premises in question, on the 18th day of *July*, 1786, made his will, executed in due form of law, and devised as follows: "I also give and devise unto my loving sons, *William Holloway*, *Joseph Holloway*, *John Holloway*, and *Justus Holloway*, all my land in fee simple, and otherwise, which *I am possessed of*, as also all my stock," &c.

After making this will, the testator became seised of *other land*, also part of the premises in question, and, while so seised, altered his will, by erasing the words "am possessed of," and putting in their place the words "die possessed of," and interlining the words "and also," making the will to read, "all my lands of which I die possessed of, and also all my stock," &c. And the testator, at the same time, endorsed on the will an instrument, as follows: "Be it remembered, that I *William Holloway*, the testator of the above last will and testament, by me signed, on the 13th day of *July*, 1786, having this day, being the 25th day of *July*, 1794, renewed the same, have made the following alteration, to wit, in the second page in the ninth line from the top, have altered it to read, 'all the lands I die possessed of,' in lieu of 'all the lands I then possessed,' and also have interlined the words 'as also,' in the same line;" which instrument was duly signed, sealed and published by the testator, in the presence of *two* persons, who also signed the same as witnesses, in his presence.

The testator, *William Holloway*, after so altering his will, died seised of the premises in question, and the defendant, being in possession, claimed to hold the same *in severalty, adversely to the claims of the lessors of the plaintiff, as heirs at law.

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The questions submitted to the court, were, 1st. Whether, by the alterations made by the testator, the will was not annulled and avoided. If not, 2d. What property passed by the will?

Ruggles, for the plaintiff. The alteration is so made as to change the description of the estate. The words in the original, "I am possessed of," are essential to the description. Those words being struck out, it would be impossible to know what lands were intended, without the aid of parol evidence. The addition, afterwards, not having been made in the presence of three witnesses, the clause must read, as if there were a blank in the place of the words "I am possessed of," and it would be necessary to resort to parol testimony to explain what was devised.

In the cases (1 *P. Wms.* 344. note 1. *Prec. in Ch.* 469. *Cowp.* 812.) which may be cited on this subject, in regard to

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revocations, it will be found, that either the act of revocation was equivocal, or that the will remained a good will, notwithstanding the obliteration or alteration of a part. In *Larkin v. Larkin*, (3 Bos. & Pull. 16.) and *Short v. Smith*, (4 East, 419.) the name of one of the devisees was struck out, and this was held to operate only as a revocation *pro tanto*, but the will still remained a good will, and did not require any parol evidence to explain it. Those cases, therefore, are not applicable to the present.

Where the act is not equivocal, there is no reference to be made to the intention to revoke; and in case of a fine levied, or recovery suffered, after a devise, the courts will presume an intention to revoke. (*Cruise*, tit. 38. c. 6. 60. 65. 3 Wils. Rep. 12. Amb. 215.)

† 2 R. S. 64.
sec. 42.

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There is a difference in the phraseology of the *English* statute and our act relative to wills. If the 3d section of the act concerning wills (24th sess. c. 9.)† be compared with the 6th section of the statute of 29 Car. II. c. 8. to prevent frauds and perjuries, it will be found, *that the latter confines the effect of the obliteration, or erasure, to the revocation of the particular clause, and leaves the rest of the will entire, whereas, by our act, the obliteration of any part or clause avoids the whole. It is consistent, therefore, with the *English* statute, that the particular clause should be revoked by obliteration, while the rest remains entire; but in the present case, under our act, the erasure or obliteration of a single clause destroys the whole will.

J. Tallmadge, contra. I shall rely on the cases which have been cited, as perfectly applicable to the case before the court, and decisive in our favor. No alteration or obliteration will amount to a revocation, unless done *animo revocandi*. It is the intention of the testator to revoke, which constitutes the revocation. (*Cruise*, tit. 38. c. 6. s. 11. 24, 25. *Doug.* 852. *Cowp.* 812. *Pow. on Dev.* 635.) The cancelling of a will is an equivocal act, and it may be shown *quo animo* it was cancelled. (*Cowp.* 52.) And where the act of cancelling is done in reference to another act, meant to be an effectual disposition, it will be a revocation, or not, according as the relative act is efficacious or not. (*Powell on Dev.* 637. *Cruise*, tit. 38. c. 6. s. 18, 19. 1 *Eq. Cas. Abr.* 409. *Prec. in Ch.* 409. 1 *P. Wms.* 344. 3 *Bos. & Pull.* 16. 4 *East*, 417.)

There was nothing in the present case to show any intention to revoke the devise; the alteration went merely to add to the estate already devised. It did not change the devise.

Admitting the words struck out to leave a blank, still there is a perfect and good devise; and parol evidence may be received to explain the intention, and that will sufficiently appear from the memorandum of the testator, endorsed on the will.

Harrison, in reply, observed, that the statute on this subject, being to prevent fraud and perjury, was a highly beneficial and salutary act. If, then, it should appear, that, by allowing the will to stand, after this alteration, a door would be opened to those mischiefs which the statute was intended to prevent, the court would look to *the general object of the statute, and endeavor to carry it into effect. Now, if the will is to stand, except as to the part obliterated, a wide avenue to fraud will be opened; for it is impossible to determine, from inspection, what were the words which have been erased. It may be that the testator had an estate in *reversion*. If we are to look to the intention, we must inquire what words the testator meant to strike out, and resort must be had to the memorandum or codicil for that purpose. We then take a codicil or writing, not executed according to the statute, and which may be a forgery, to show the intention of the testator, and to support the devise.

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As to those acts which are to show the *animus revocandi*, some are equivocal; as if a man, by mistake, cancels a wrong paper, or cancels his will, because he thought another will was completed, when it was not. But where a party obliterates his will, without reference to any future or subsequent act, it must be regarded as a present and complete act of revocation. Where acts are equivocal, and have reference to some other acts, the intention to revoke may be shown; but no such evidence is admissible, where the act is not equivocal. The revocation does not, therefore, always depend on the intention. That rule has been laid down too broadly by the writers who have been cited.

In the cases of *Larkin v. Larkin*, and *Short v. Smith*, the original state of the will and the alteration made were visible and apparent to the witnesses; but in the present case, the witnesses cannot say what were the words struck out.

The difference in the phraseology of our act, and that of the *English* statute from which it was taken, is not to be accounted for, but on the supposition that it was the intention of the legislature to depart from the *English* statute; and if that is attentively examined, it will be found that the revocation is confined to the particular clause obliterated, and where, on the face of the will, *the alteration does not materially affect the rest of the devise.

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Per Curiam. The obliterations in the will were made, not with an intent to destroy the devise already made, but to enlarge it, by extending it to lands subsequently acquired. The testator, however, failed in making interlineations and corrections which could operate, from not having the amendments attested according to law. The obliterations cannot, therefore, destroy the previous devise, for that was not the testator's intention. The mere act of cancelling is nothing, unless it be

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done *animo revocandi*. Here the devise was left untouched, and the only alteration was to embrace other lands in the same devise. It is, therefore, very clear, from all the authorities cited on both sides, that the first devise must stand good. The case of *Onion v. Tyrer* (1 P. Wms. 343. note 1.) and the case of *Short v. Smith* (4 East, 419.) are decisive, and much in point. The lessors of the plaintiffs are, then, entitled to six tenths of all the lands acquired by the testator after the making of his will, in July, 1786, and to no more.

: Judgment accordingly.

CHW against WOOLLEY.

Where a declaration on a promissory note alleged that the defendant did not pay the sum of money

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in the note mentioned, &c. and the defendant pleaded *puis darrein continuance*, that he "paid to the plaintiff the several sums of money mentioned in the plaintiff's declaration; on demurrer, the plea was held good, being as broad as the declaration; and that there was no necessity of stating that the plaintiff accepted the money in satisfaction. (a)

THIS was an action of *assumpsit*, brought by the plaintiff, as endorsee, against the defendant, as first endorser of a promissory note. The declaration contained two counts, on two notes; the one dated the 3d of March, 1808, payable sixty days after date, without defalcation or discount, at, &c., and endorsed the same day by the *payee to the plaintiff. The other was on a like note; payable in 30 days. The declaration was of August term, 1808, and averred, that the notes having become payable, &c., the plaintiff presented the same, &c., to the defendant, and requested payment, &c., and that the defendant did not then, nor at any time since, pay the said sum of money in the said notes mentioned, to the plaintiff, but then and there wholly refused, &c. And though often requested, &c., hath not paid the said sums of money in the said notes, &c.

The defendant pleaded, in August term, the general issue, with notice.

The defendant afterwards put in a *plea puis darrein continuance*, in November term, which stated, that since the last continuance, and before the second Monday of November, to wit, on the 25th of September, 1808, at, &c., "he paid to the said Claiborne Chew the said several sums of money mentioned in the declaration of the said C. Chew, and this he is ready to verify," &c. To this plea there was a general demurrer and joinder.

Mulligan, in support of the demurrer. Payment cannot be pleaded *puis darrein continuance*, without it is also stated to have been accepted in satisfaction; more especially where it is on a promise or contract bearing interest. The action of *assumpsit* is for damages, and the plea should go in discharge

(a) Vid. the cases cited in *Watkinson v. Inglesly*, 5 Johns. R. 306.

of the damages. (1 *Ld. Raym.* 234. 2 *Salk.* 622, 623. 4 *Mod.* 250.) The sum paid, in the present case, being less than what the plaintiff was entitled to recover, it must be shown that it was accepted in satisfaction.

A plea of *puis darrein continuance* confesses the cause of action, (1 *Salk.* 178. 2 *Stra.* 1103.) and it ought to be in discharge of the whole.

In the case of *Johnston v. Brannan*, (5 *Johns. Rep.* 268.) the court recognize the general rule, that a plea of payment of a less sum, after the debt is due, is not good, unless it is stated to have been accepted in satisfaction. Where the plaintiff has a vested right of action, it cannot be divested *by the act of the defendant alone. As to precedents, they may be found in *Lilly's Entries*, 121, 128. 393.

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Baldwin and Hoffman, contra. Where the party accepts the principal of his debt, he cannot, afterwards, sue for the interest. (3 *Johns. Rep.* 229.) There was, then, a complete discharge of the right of action. The plea states that the defendant paid the several sums mentioned in the plaintiff's declaration. That the plaintiff accepted the money in satisfaction is a necessary inference from the fact of a payment of the principal. Interest is an accessory, and follows the principal. Whatever would be a good defence before action, may be pleaded *puis darrein continuance*. (5 *Johns. Rep.* 386.) There are numerous precedents of pleas in the form of the present. (2 *Rich. K. B. Pr.* 227, 228, 229. *Att. K. B. Prac.* 21. *Bohun's Declarations*, 323, 324. *Pleader's Assistant*, 449. 3 *Attorney's Vade Mecum*, 451. *Hearne's Pleader*, 130, 197. *English Pleader*, 110.)

Hopkins, in reply. Principal and interest are not known on the record. The action is for damages which are and must be uncertain. In an action of debt, the plaintiff also claims damages for the detention, which are unliquidated. The defendant cannot himself liquidate and fix the damages, merely by payment of the debt or principal: they must be assessed by a jury, or fixed by consent of parties. Damages are accruing from the time of the breach of the promise, and a tender of the principal, afterwards, is not good.

The conclusion in the declaration is for a large sum in damages. The plea should, therefore, state that the sum paid was accepted in satisfaction of the damages, so as to be a full answer to the declaration.

Per Curiam. This was an action by the endorsee against the endorser of two promissory notes, and the declaration states, that the defendant "did not pay the said sums of *money in the said notes mentioned;" and the breach also alleges the default in the same terms, that the defendant "had

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not paid the said sums of money in the said notes mentioned." The plea *puis darrein continuance* states, that the defendant "did pay to the plaintiff the said several sums of money mentioned in the declaration of the plaintiff." The plea is as broad as the declaration, and must be construed to be commensurate with the demand. It must be taken to embrace the whole sum due on each note, which will of course include the interest; and it was therefore not requisite to aver in the plea, that the sum was accepted in satisfaction. That would be turning a plea of payment into a plea of accord and satisfaction. The allegation of payment of the demand implies the acceptance of the money by the plaintiff; and if the fact of payment had been traversed, and it had appeared in proof that the interest legally due on the notes had not been paid, the plea would have failed for want of proof; and if the fact was, that the plaintiff had thrown in the interest, then the plea ought to have stated that the sum paid was accepted in full satisfaction and discharge, as was done in the case of *Johnston v. Brannan*. (5 *Johns. Rep.* 268.) The good sense and meaning of the plea, as it stands, is, that the defendant had paid the amount of the notes, and if they were notes carrying interest, that he paid the interest also.

Judgment for the defendant.

J. MORRELL, *qui tam*, &c., against FULLER.

In an action
qui tam, &c.
brought by a
common in-

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former, under
the 2d section
of the act for
preventing usury,
(10th sess. c.
13.) the declaration
must state
that the party
aggrieved neglected
to sue
within one year,
in order to give
the plaintiff a
right of action.

(b)

THIS was an action of debt, brought by the plaintiff, as a common informer, on the second section of the "Act for preventing usury." (10th sess. c. 13.) (a)

*The declaration stated, "For that whereas the said *Jeremiah Fuller*, after the 8th *February*, 1787, to wit, on the 6th of *August*, 1808, was indebted to one *Thomas Morrell*, now deceased, in the sum of 92 dollars and 28 cents, whereby an action had accrued to the said *Thomas Morrell*, by force of and according to the statute in such case made and provided," &c.

"And the said *John Morrell*, who sues as well, &c., says, that the said defendant, on the 9th day of *August*, 1809, at *Albany*, &c., was indebted to the said *John Morrell*, and the said poor, in the said sum of 92 dollars and 8 cents, whereby an action hath accrued to the said *John Morrell*, who sues, &c., to demand and have of the defendant, &c. the said sum of 92 dollars and 8 cents as aforesaid, according to the form of the act aforesaid, entitled, "An act to prevent usury," &c.

A verdict having been found for the plaintiff,

(a) 1 R. S. 772. sec. 3, 4.

(b) Vid. S. C. 8 *Johns. R.* 218.

Rodman moved in arrest of judgment. 1. Because the plaintiff was not entitled to this action, without showing that the party paying the money had neglected to bring his action within a year; and this being essential, should have been stated in the declaration.

2. Because there is no express averment of the payment of the money, and that it was over and above the legal rate of interest.

3. The plaintiff sues for himself as well as the poor of *Schenectady*; yet the *venue* and cause of action are laid in *Albany*, where it has been tried, so that the poor of *Albany* would be entitled to a moiety of the money.

Foot, contra.

Per Curiam. The declaration does not state a cause of action, because it has no averment that the party aggrieved neglected to sue within the time prescribed by the statute. For aught that appears, *Thomas Morrell* *may have sued for the debt in question, and without an omission on his part to sue, the plaintiff has no right of action. This case is within the reason, and embraced by the principle, of *Cole v. Smith*. (4 *Johns. Rep.* 193.) Though the expressions are somewhat different in that part of the two statutes relative to gaming and to usury, which gives an action to the common informer; yet there is the same reason and justice in both cases, that the declaration should state the facts which are essential to constitute a right of action. The record which the court referred to in *Cole v. Smith*, stated the neglect of the injured party to prosecute, and this is a material averment, when the common informer prosecutes under either statute. Judgment must, therefore, be arrested.

Judgment arrested.

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DE DIEMAR and Wife against VAN WAGENEN.

THIS was an action of covenant. The declaration set forth a certain indenture, made the 6th of *March*, 1800, between *Ann Griffiths*, *Gerrit H. Van Wagenen*, *the defendant, and *Thomas Hook*, of the city of *New-York*, of the one part, and *Frederic D. Diemar* and *Cornelia* his wife, of the city of *London*, of the other part; which recited, that *Ann Griffiths* was the widow of *Joseph Griffiths*, deceased, of the city of *New-York*, who was one of the children and residuary legatees, and sole administrator with the will annexed, of *John Griffiths*, his father, late of the same city, deceased; that *John Griffiths*, by his last will, dated the 13th of *March*, 1764, bequeathed to his wife the rents and

A. having made his will, died in *New-York*, leaving *B.* and *C.* his surviving children and residuary legatees. *B.* took out administration with the will annexed, and died, leaving goods, &c. of *A.* unadministered, and par-

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ticularly a large debt due from D. to the estate of A. in England. It was covenanted and agreed between E., administrator of B., and C., who resided in England, that E. should release to C. all right to the goods of A. in England, and empower C. to take out administration in England on the goods, &c. of A., and to indemnify C. from all legacies, actions, &c. in consequence of taking out such

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administration in England; and C. covenanted to account to A. for all moneys she should receive of D., and E. covenanted, that in case C. could not obtain administration in England, or in case, after obtaining such administration, D. should refuse to account for all moneys due from him to the estate of A., and pay the same within one month after notice and request to him from C., that E., as administrator of B. would pay and satisfy to C. all her full share of the real and personal estate of A., her father, &c. C. obtained administration in England of the goods, &c. of A., and demanded payment of the debt due from D., who being before and at that time insolvent, and unable to pay, offered to pay C. the amount of the principal of the debt due to the estate of A. exclusive of the interest which had accrued, if C. would acquit and discharge him from all further demands, but otherwise he would not pay; and C., as most advantageous to the estate of A., accepted the offer, and received the principal of the debt from D. without the interest, and thereupon released and discharged him. In an action of covenant brought by C. against E. on the agreement to recover her share of the estate of A., it was held, that the release by C. of the debt due of D. to the estate of A., was a good defence; that C. by the agreement was to take out administration in England, solely for the purpose of collecting the debt due from D., and had no discretion to compound for the same, or release any part of it; and by so compounding and releasing D. C. had taken the debt upon herself, and had failed to perform the condition precedent to her right of action against E., the administrator of B. under the agreement. (a)

profits of his estates, both real and personal, during her life, and after her death, devised his real and personal estate to his children, and the survivors and survivor of them, in equal portions. The testator died in November, 1784, leaving four children, two of which soon after died, and the widow died in September, 1789, leaving Joseph and Cornelia the survivors. All the executors named in the will died, without proving the will; and administration with the will annexed, was granted, at New-York, in November, 1789, to Joseph Griffiths, who died intestate, the 13th of December, 1796, leaving goods, chattels, and credits of John Griffiths, at the time of his death, unadministered, and particularly a large sum of money, in the hands of Thomas Pomeroy, of the city of London, merchant.

Letters of administration on the estate of Joseph Griffiths, deceased, were granted at New-York, to Ann Griffiths, Gerri Van Wagenen and Thomas Hook; and Cornelia, one of the plaintiffs, remained the only surviving child of John Griffiths.

There being no personal representative of John Griffiths, who could collect and receive the moneys due to his estate from Thomas Pomeroy, the administrators of Joseph Griffiths came to an agreement with the plaintiffs to enable Cornelia De Diemar to take out letters of administration, with the will annexed, in England, of the goods and chattels of John Griffiths, her father, not yet administered, and to indemnify her, &c. The indenture *then witnessed, that Ann Griffiths, G. H. Van Wagenen and Thomas Hook released to Cornelia De Diemar all the right, &c. whatsoever, of them, or either of them, to the unadministered estate and effects of John Griffiths, deceased, in Great Britain, and they authorized and empowered, as far as in them lay, the said Cornelia to take out of the prerogative court of Canterbury, or some other proper court in Great Britain, letters of administration, with the will annexed, of all the goods, chattels and credits of John Griffiths, then unadministered, in such manner as the said Cornelia should deem proper and be advised; and they further covenanted to indemnify the plaintiffs from the payment of all debts and legacies due from the estate of John Griffiths, and all actions, &c., by reason of the said Cornelia's taking out such letters of

(a) Vid. *Marvin v. Stone*, 2 Cowen, 781. *Murray v. Blatchford*, 1 Wendell, 503. *Hunter v. Bryant* 2 Wheat. 32.

administration, &c. And the plaintiffs covenanted, that whatever moneys should be obtained by them, or either of them, from the said *Thomas Pomeroy*, due to the estate of *John Griffiths*, (deducting all costs and expenses, &c.) should be allowed in account with the said *Ann Griffiths*, *Gerrit Van Wagenen*, and *Thomas Hook*, touching the part and share of the said *Cornelia* in the rent and personal estate of *John Griffiths*.

And the said *Ann Griffiths*, *G. H. Van Wagenen*, and *T. Hook*, further covenanted and agreed, that in case the said *Cornelia* could not take out letters of administration in *England*, on the goods of the said *John Griffiths*, or in case she should obtain such administration, and the said *Thomas Pomeroy*, his executors, &c., should neglect or refuse to account for all moneys justly due from him to the estate of the said *John Griffiths*, and to pay the same over to the plaintiffs, in the space of one month next after request by them thereof made, then and in such case, the said administrators of *Joseph Griffiths* covenanted to satisfy and pay to the said *Cornelia* all her full part and share of the real and personal *estate of her father, the said *John Griffiths*, and of the rents, issues, interest and profits thereof, &c.

The plaintiffs then averred that the share of *Cornelia*, in the estate of her father, amounted to a large sum, to wit, 25,000 dollars; that she did take out letters of administration in *England*, &c., and gave notice thereof to the said *Thomas Pomeroy*, and requested him to pay to the plaintiffs the moneys justly due from him to the estate of *John Griffiths*, amounting to a large sum, to wit, 10,000 dollars; and though the said *Pomeroy* paid to the plaintiffs part of the debt, to wit, 2,000 dollars, yet he did not and would not account for the residue, nor pay the same to the plaintiffs, within the space of one month next after such request made to him, nor at any other time, and the same still remains due and unpaid; that the costs and expenses of obtaining administration amounted to 1,000 dollars, and that, after deducting the said sum for costs and charges, the plaintiffs are ready and willing to allow the residue of the moneys so received of the said *Thomas Pomeroy*, to wit, 1,000 dollars, in account with the said administrators of *Joseph Griffiths*, touching the share of the said *Cornelia* in the estate of her father, the said *John Griffiths*, &c., of all which notice was given to the said administrators, in the life-time of *Ann Griffiths* and *Thomas Griffiths*, who have since died, leaving the defendant the only surviving administrator of the said *Joseph Griffiths*; and the plaintiffs did request the said administrators, in the life-time of the said *Ann* and *Thomas*, and the defendant, since their death, to pay to the said *Cornelia* her share of her father's estate, &c. And although the plaintiffs have performed all things, &c., yet the said administrators, in the life-time of the said *Ann* and *Thomas*, and the defend-

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ant, since their death, did not, when so requested, &c., pay, and hath ever since refused to pay to the said *Cornelia*, her share of her father's estate, &c.

The defendant pleaded three pleas: 1. That *Cornelia* **De Diemar* did not obtain letters of administration in due form of law, in *Great Britain*, of the goods, &c., of *John Griffiths*, &c., on which *issue* was joined. 2. That she did not give notice to *Thomas Pomeroy*, and request him to pay, &c., on which *issue* was joined. 3. That on the 11th of *July*, 1800, *Thomas Pomeroy* accounted for and paid to the plaintiffs a large sum of money, to wit, 5,602 dollars and 19 cents, as being the amount then justly due from him to the estate of *John Griffiths*, and that the plaintiffs accepted the same as the amount then justly due to the said estate, and discharged and acquitted the said *Thomas Pomeroy* from any further accounting with them, and did not then, or at any other time, require the said *T. P.* to account for or pay any further sum, when, in fact, a much larger sum, to wit, 10,000 dollars, was then due from the said *T. P.*, and ought to have been accounted for to the plaintiffs.

The plaintiffs replied to the *third* plea, *protesting* that the said *T. P.* never accounted for or paid to the plaintiffs the sum of 5,602 dollars and 19 cents, &c., that on the 14th of *September*, 1786, the said *Thomas Pomeroy* became wholly insolvent, and unable to pay his just debts; and that, at the time of making the said indenture, &c., and ever since, he hath been wholly insolvent and unable to pay his just debts, and it was then, and hath ever since been, impossible for the plaintiffs to recover and receive of the said *T. P.* the full amount of all the moneys which were justly due from him to the estate of *John Griffiths*; but the said *Thomas* was willing, and on the 11th of *July*, 1800, offered to pay the plaintiffs such sum as, with other payments before made on account of moneys due from him to the estate of the said *John Griffiths*, would make up the full amount of all the principal sum, exclusive of the interest thereon accrued, so due from him to the said estate, on condition that the plaintiffs would acquit and discharge him from any further accounting with them; and that *without such discharge he would not pay; and the plaintiffs could not have recovered from him any part of the moneys due to the said estate; whereupon it became and was beneficial to the estate of the said *John Griffiths*, and to the defendant, to accept the offer so made by the said *T. P.*, and receive the sum of money tendered, and to discharge him from any further accounting, and thereupon the plaintiffs, after taking out letters of administration, &c., received of the said *T. P.* the sum of 2,084 dollars and 22 cents, being the full amount of all the principal, exclusive of interest, then due from the said *T. P.* to the said estate, and did thereupon acquit and discharge the said *T. P.* from further accounting

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with them, &c. *Without this*, that the plaintiffs ever accepted the said sum of 5,602 dollars and 19 cents, mentioned in the third plea, or any other sum, as the amount justly due from the said *T. P.* to the said estate.

To this replication there was a general demurrer and joinder.

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Robinson, in support of the demurrer. The replication expressly avers that *Pomeroy* was acquitted and discharged; and it must be inferred that this was a legal and effectual discharge, or a release under seal, so as to bar all future claim. The debt must be extinguished by such release, which must be binding and conclusive, as *Mrs. De Diemar* was the residuary legatee, and administratrix with the will annexed. An administrator cannot release a debt without a *devastavit*: (*Bac. Abr. Ex. & Adm. L. Cro. Eliz.* 43. 1 *Vernon*, 474.) and he makes himself liable for the whole debt. Is there any thing in this case to take it out of this general and well settled rule of law? The object of the agreement was to save the plaintiffs from costs, and to secure them, in case they should fail in recovering the debt, after a *bona fide* attempt for that purpose, in *England*. There is nothing in the agreement which authorizes *the plaintiffs to do any thing more than could be legally done by an ordinary administrator. As the law imposes a strict line of duty, the instrument is to be construed strictly, in regard to the conduct of the plaintiffs; and unless they can clearly show a power to compromise the debt, they must be made answerable for the amount. They must be judged according to the law of *England*. The insolvent law of this state (24th sess. c. 131. s. 10.)† specially authorizes executors and administrators to become petitioning creditors of an insolvent.

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† 2 R. N. 16.
sec. 3.

Hopkins, contra. This is not like the case of an action against an administrator for a *devastavit*; but I will consider it in that point of view. Though, generally speaking, an executor or administrator cannot release or compound a debt; yet if it is done for the benefit of the estate, he is not made liable. In *Blue v. Marshall*, (3 *P. Wms.* 381.) Lord Chancellor *Talbot* held that an administrator who had released a tenant, who was insolvent, from the arrears of rent, on his giving up the possession, was not responsible. It is just and reasonable that a beneficial compromise, made by an executor or administrator, should be allowed. It is fit and convenient that they should have this power; being answerable for its exercise in a manner beneficial to the estate. It is true, there are old cases to the contrary; and it was once held, that an executor or administrator could not release the penalty of a bond on payment of the condition, without a *devastavit*; but the modern doctrine is more rational. In *Norden v. Levit*, (2 *Lev.* 189.) the court strongly inclined to the opinion that the compound-

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ing of an action of *trover* by an administrator was not a *devastavit*.

Harison, in reply. The case of *Blue v. Marshall* was in a court of *chancery*, where matters are decided *on equitable principles. But we are in a court of law, where equitable circumstances are not taken into consideration. Whether the debtor was insolvent, or not, or whether the compromise was beneficial to the estate, or not, cannot be objects of inquiry in a court of law. It is enough that the plaintiffs have released the debt, so as to prevent the possibility of any future claim on the debtor. The rule of law is clear and settled, that if an executor or administrator submit a debt of 20 pounds to arbitration, and the arbitrators award only 10 pounds, it is a *devastavit*, and the executor or administrator is liable for the whole.

In *Norden v. Levit*, (2 *Lev.* 189, 190. 1 *T. Jones*, 88.) the payment was affirmed in the House of Lords, and the administrator held liable for a *devastavit*. It is said, that this is the doctrine of the old cases; yet no modern determinations in courts of law have been shown to the contrary. Indeed, the law is too well settled to admit of a doubt.

Per Curiam. The release of *Pomeroy's* debt by the plaintiff *Cornelia* as administratrix, is a good defence in this action. It appears by the covenant, that she took out letters of administration in *England*, by agreement with the other parties to the covenant, for the express and sole purpose of collecting *Pomeroy's* debt; and in consideration of her doing this, she received a release and indemnity from the other parties. They were only to pay her the distributive share of her father's estate, in case *Pomeroy* should neglect or refuse to account and pay his debt. By releasing that debt, she has disabled herself from a remedy at law under the covenant. The breach contemplated by the parties has not occurred. The old and strict rule of law is, that an administrator cannot release a debt without being responsible for it; and though this rule has been relaxed in equity, as between the administrator or executor and the legatees, or next of kin, (and, perhaps, the same relaxation ought to take place at law, if a court of *law should take cognizance of claims between such parties,) yet here the plaintiff has not fulfilled the condition precedent to a right of action upon this covenant. If the whole scope and intent of the agreement be compared and taken together, its meaning appears evidently to be, that the plaintiff *Cornelia* was to invest herself with the power of an administratrix, for a specific purpose, which was not that she should exercise her discretion in collecting, compounding or releasing the debt of *Pomeroy*. It was merely that she should be vested with legal authority to demand and receive the debt. The administrators here never meant that

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she should assume or exercise any other or further power. To entitle herself to a remedy at law under this covenant, she was bound to execute this trust upon strict legal principles. By compounding the debt, she has taken it to herself, and judgment must be rendered for the defendant.

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Judgment for the defendant.

JUMEL and DESOBRY against THE MARINE INSURANCE COMPANY.

THIS was an action on a policy of insurance, dated the 10th October, 1807, on the brig *Stephen, Barker*, *master, on a voyage from *New-York* to *Bordeaux*, and at and from *Bordeaux* back to *New-York*; warranted *American* property, proof whereof, if required, to be made here only; and warranted by the assured not to abandon, in case of capture or detention, until six months after advice thereof received at the office of the defendants, unless previously condemned.

A verdict was taken, by consent, at the *New-York* sittings, the 14th April, 1810, subject to the opinion of the court on the following case. The vessel sailed from *Bordeaux*, on her return voyage, with a cargo of brandy and dry goods, on the 21th December, 1807, but was detained in the river by an embargo, until the 24th January, 1808. On the same day she was captured by a *British* privateer and carried into *Plymouth*, and both vessel and cargo were libelled in the Admiralty Court. A claim was interposed in behalf of the plaintiffs, who were owners of the vessel and cargo, by Messrs. *Batard, Sampson*

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New-York to *Bordeaux*, and at and from *Bordeaux* to *New-York*. The vessel, on her return voyage, was captured the 24th of January, 1808, and carried into *England*, and on the 1st of June, 1808, the insured abandoned. The correspondents of the insured, at the request of the master, put in a claim for the assured, as owners of the vessel and cargo; and the

vessel, on the 29th of March, 1808, was condemned, and the cargo restored. They entered an appeal from the sentence as to the vessel; and the captors appealed from the sentence as to the cargo. By compromise, both appeals were withdrawn, and the master, on the 3d of June, 1808, purchased the vessel of the captors for 1,300 pounds, with all her original papers, and sailed for *New-York*, where he arrived in safety, and delivered the cargo. To raise money to pay for the vessel, and to defray the expenses arising from the capture, the master gave a *bottomry* bond to the correspondents of the insured, in *London*.

It was held, that the insured were entitled to abandon for a total loss, and their rights having become fixed by the act of abandonment, on the 1st of June, 1808, they were not bound by the subsequent acts of the master, but were entitled to recover for a total loss, and also for all the expenses incurred in endeavoring to recover the property, prior to the composition between the master and captors, which expenses were to be apportioned, as general average, and borne by the vessel, freight and cargo; but the insured on the vessel could only recover the proportion chargeable to the vessel.

The rule that the insured may recover, in the first instance, of the insurers on the vessel, the whole general average, does not apply to the case where the ship, freight and cargo belong to the same person, and the freight and cargo are not insured.

The insurers having refused to accept the ship and affirm the purchase made by the master, they were held not to be answerable for the *marine* interest secured to be paid by the *bottomry* bond, nor for any charges or loss consequent to the purchase; but only for a total loss and expenses of laboring for the recovery of the vessel, &c. prior to the composition with the captors. (a)

(a) Vid. *Gardere v. Columbian Ins. Co. infra*, 514. *M^r Bride v. Marine Ins. Co. infra*, 433. *Barker v. Phoenix Ins. Co.* 8 Johns. R. 307. *Francis v. Ocean Ins. Co.* 6 Cowen, 404. S. C. in error, 2 Wendell, 64. *Dickey v. New-York Ins. Co.* 4 Cowen, 222. *Id. v. American Ins. Co.* 3 Wendell, 658. *Calvert v. Pacific Ins. Co.* 1 Wendell, 561. *Watson v. Marine Ins. Co. supra*, 57.

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& *Sharp*, the correspondents of the plaintiffs, to whom the master addressed himself, and at his request. On the 29th March, 1808, the vessel was condemned, and the cargo restored. The claimants appealed from the sentence condemning the vessel, and the captors appealed from the sentence restoring the cargo. An abandonment was made by the plaintiffs on the 1st June, 1808, which was renewed the 23d of August, 1808. An arrangement was made between the captors and the master, by which it was agreed, that the master should relinquish the appeal entered as to the vessel, and the captors should relinquish the appeal as to the cargo; and both appeals were accordingly withdrawn, on the 21st of April, 1808, and an entry made in the minutes of the admiralty to that effect, and a writ of unlivery or restitution of the cargo was sued out. This arrangement was made by the advice of counsel, who gave a decided opinion that the sentence of condemnation would be affirmed, and probably with costs.

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*With the approbation of *Batard, Sampson & Sharp*, the master afterwards purchased the vessel of the captors. They demanded 1,500 pounds, but they finally agreed to take 1,300 pounds, and deliver the vessel, with all her original papers, as she was before capture. The purchase was concluded on the 3d of June, 1808, and a bill of sale executed; and on the 14th June, 1808, the king's license was obtained, ratifying the purchase, and permitting the vessel to sail with her original papers. To pay the purchase-money, and defray the other expenses arising from the capture, the captain took up money on *bottomry* interest, and executed a *bottomry* bond to *Batard, Sampson & Sharp*, who advanced the money; the bond, amounting to 13,634 dollars and 84 cents, was paid by the plaintiffs, after the arrival of the vessel at *New-York*. *Batard, Sampson & Sharp* wrote to the plaintiffs, on the 1st of June, 1808, informing them what had been done; and that it was necessary for the master to take up money on *bottomry*, to pay the purchase-money of the vessel and the other expenses, and enclosing their account of the sums advanced by them, for which they had taken the bond. In their letter, *Batard, Sampson & Sharp* mention, that the price paid for the vessel was, perhaps, higher than she would have sold for at public sale; but it was thought, that it would be more agreeable to the plaintiffs, to avoid the inconvenience and expense of landing the cargo, and sending it by another vessel. The vessel arrived in safety at *New-York*, and delivered her cargo. The plaintiffs afterwards, on the 23d of August, 1808, addressed a letter to the defendants, informing them of the arrival of the vessel, and the delivery of the cargo, and repeating their abandonment. They also stated, that the captain had been obliged to give a *bottomry* bond, and if the defendants meant to consider the purchase as made for their benefit, they must pay the bond, after deducting the freight, or if they disavowed the purchase, the master, paying 306

the bond, *would be at liberty to dispose of her; that if the defendants returned no answer, the plaintiffs would be obliged to sell the vessel at auction, and after paying the bond and charges, to hold the surplus for the benefit of whom it might concern. To this letter the defendants, on the 29th *August*, 1808, answered that they were not able to say whether they did or did not accept the abandonment, but they propose to pay the bond, deducting the freight, and that the vessel remain or be sold for the benefit of whom it may concern. The plaintiffs, in their reply, dated the 13th *September*, 1808, say they "accede to the proposals," and are ready to receive the amount of the bond, deducting the freight, leaving a balance of 11,412 dollars and 43 cents, and enclose the bond, on the payment of which they would delay the sale of the vessel, and take all possible care of her for the benefit of whom it might concern.

The defendants, afterwards, refused to pay the bond, and the vessel was sold, and the proceeds applied to the discharge of the bond.

A verdict was taken for a nominal sum, and it was agreed that the amount for which a judgment was to be entered, should be liquidated by two persons named, on such principles as the court should direct

Hoffman, for the plaintiffs. In consequence of the capture and condemnation, the plaintiffs had a right to abandon for a total loss. An abandonment having been duly made, the master became the agent of the defendants; and his acts cannot affect the plaintiffs, who have never adopted them. Though the master may, by his acts, turn a partial into a total loss; he cannot, without the assent of the assured, convert a total into a partial loss. So far from adopting the acts of the master in this case, the plaintiffs always communicated them to the defendants, at the same time insisting upon and confirming their abandonment, made on the 1st of *June*, 1808.

*But admitting that the master was the agent of all parties, he was not bound to prosecute the appeal; and having acted *bona fide*, and by advice of counsel, his conduct cannot deprive the plaintiffs of their right to recover for a total loss. In *Cheviot v. Brooks*, (1 *Johns. Rep.* 364.) which was an action against the master, for his negligence and misconduct, in not protecting the property captured, it was held to be altogether a question of *good faith*. The acts of a mutual agent do not prejudice the rights of either party under the contract, though they may affect the interest of one, and not of the other. Neither party guaranties the acts of a mutual agent. Even if the appeal had been voluntarily withdrawn by him, still the rights of the plaintiffs, under the contract, remain the same. (2 *Caines's Cases in Error*, 47. 62. *Ludlow v. Simond*.) If the master, before a condemnation, obtains the restoration, or there is a recapture, it will take away the right of abandonment

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But if the master should neglect to obtain a restoration, or to interpose a claim, when he ought so to have done, his negligence or misconduct does not affect the right of the insured under the contract. The master, in this case, was not able to obtain a restoration until after an abandonment had been made.

It may, perhaps, be said, that the agreement made by the master was for the benefit of the cargo. If so, it may possibly furnish a claim on the underwriters on the cargo; but it cannot affect the plaintiffs' right of recovery on the present policy. Though the cargo was incidentally benefited, yet the arrangement was also advantageous to the insurers on the ship; for she was purchased for a sum less than she was, afterwards, sold for here; and she also earned freight. If no such arrangement had been made, the defendants would have been liable for the whole amount insured.

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The abandonment was made on the 1st of *June*, and the purchase was made the 3d of *June*, and was not ratified by the king in council until the 14th of *June*, *when the permission was given to the ship to sail with her original papers; and the purchase would have been of no avail without such license. If an *American* vessel loses her papers, by which her neutral character is affected, by a peril within the policy, it is a ground of abandonment. The effect of a purchase or compromise made by the master, after abandonment, on the rights of the parties, has been decided. (*MMasters v. Shoolbred*, 1 *Esp. Cas.* 237. *Abbott v. Broome*, 1 *Caines's Rep.* 292. 1 *Johns Rep.* 592. 5 *Johns Rep.* 310. 321. 1 *Johns Rep.* 406. *Mar. Ins. Co. v. Tucker and others*, 3 *Cranch's Rep.* 357. 2 *Caines's Rep.* 280. 301.) The insurers may always elect to consider the purchase as made for their benefit; and the insured are bound to render them an account. The insured may also elect to take the purchase; but if he does so, it is a waiver of the abandonment. But a mere purchase by the master does not, *ipso facto*, turn a total into a partial loss. The insured, unless he does some act adopting the purchase, is not to be prejudiced by it. The cases of *Abbott v. Broome*, and *Saidler & Craig v. Church*, are much stronger than the present. The rights of the plaintiffs were fixed by the abandonment, (1 *Caines's Rep.* 444. 4 *Dall. Rep.* 446. *Dutith v. Gatliff*, 3 *Mass. Rep.* 37. 56. *Oliver v. Newb. Mar. Ins. Co.* 1 *Term Rep.* 608.) and cannot be changed by subsequent events, as they have done no act amounting to a waiver.

Then, considering this as a total loss, what is the amount which the plaintiffs are entitled to recover? We contend that the defendants are to be charged with the amount of the policy, and interest thereon after 30 days from the time of abandonment, and with the *bottomry* bond, or the amount paid for the vessel in *England*, with the commissions, *bottomry* interest, and exchange; and they are to be credited with the net
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amount of freight received, with interest, and the net amount of the sale of the vessel, with interest, and the balance is the sum for which the plaintiffs are entitled to judgment. It is to be presumed that the bottomry bond was given for a necessary and just cause, in order to procure the liberation of the vessel and cargo. By the capture and condemnation the insured ceased to be owners. The holder of the bottomry bond, after the purchase, is to be considered as *the legal owner, leaving to the insurer or insured an equitable interest only. (*Smith v. Williams*, 2 *Caines's Cases in Error*, 110.) As the defendants, to whom the ship was abandoned, refused to pay the bottomry bond, she was sold for that purpose. The reason assigned by the defendants for not paying the bond, was, that there were *items* included which were general average. But the bottomry was on the ship, and they or the ship must be liable for it. They are answerable, also, in the first instance, for the whole amount of the general average, and must look to the other parties for contribution. (*M'Grath and Higgins v. Church*, 1 *Caines's Rep.* 196.) While the bottomry continued, the plaintiffs never could be deemed to be restored to the ownership or dominion of the vessel.

Again, the plaintiffs having paid more than a moiety of the *value* of the ship, by way of salvage, or to procure her liberation, were entitled to abandon on that ground.

On the supposition that the plaintiffs are only to recover for a partial loss, they are entitled to receive, besides the general average and charges against the ship, the amount paid for the ship in *England* and commissions, the bottomry interest, commission and exchange, together with the interest from the time the bond was paid.

Robinson and Colden, contra. Any interference of the insured or their agents, after the event has happened, which is the ground of abandonment, is a waiver of the abandonment. The authority of the insured to interfere is derived from the clause in the policy, which makes it lawful for them to sue, labor, &c., for the defence, safeguard and recovery of the property; and any interference on their part beyond this, is a waiver of the right of abandonment. Whose agent, then, was the captain, when he withdrew the appeal? From the time of the happening of the events which would authorize an abandonment, until the insurer has made his election to exercise his right, the master is the mutual agent of both *parties; and while he acts *bona fide* for the concern, his conduct will not prejudice either party; but if he act *mala fide*, or against the interest of the concerned, the insurer is not to be prejudiced by his acts. (*Park*, 6th edit. 88. 1 *Bl. Rep.* 313.) He may ransom or purchase the vessel before condemnation; and we do not mean to say that he may not relinquish an appeal, *bona fide*, for the interest of both parties; but unless he acts for the

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benefit of the insurers, they are not to be affected by his conduct. (*Dederer v. Del. Ins. Co. Condry's edit. Marsh*, 615. in note. 1 *Johns. Rep.* 141. 2 *Caines*, 301. 1 *Term Rep.* 608. *Doug.* 219.) The master did not act for the benefit of the defendants; for he gave more for the vessel than she would have sold for at auction; and the premium paid for the money advanced far exceeds the freight. The plaintiffs were also owners of the cargo, and the appeal as to the ship was withdrawn in consideration of the appeal as to the cargo being relinquished. The arrangement was a matter of speculation, if not a fraud. The property was warranted *American*, and condemned as belonging to an enemy; but how could the plaintiffs say that the decree would not be reversed, when it was in their power to establish the truth of their warranty? There was no necessity to sacrifice the vessel for the liberation of the cargo; and the chance of being subject to costs would not justify the withdrawing the appeal. The master is bound to use the utmost vigilance for the preservation of the property intrusted to his care. Admitting that he is not obliged to enter an appeal after condemnation, still, after he has, in fact, entered an appeal, he is bound to prosecute it. The appeal would not have been entered, if he had not been advised that there was a prospect of its reversal. Though he was not bound to take upon himself the employment of master, yet, having done so, he is obliged to proceed and discharge all the duties of a master. As well might it be pretended, that after a decree of restitution, the master is not obliged to sue out a writ of *unlivery*.

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Though an abandonment has relation back to the cause, yet it is only in order to ascertain the rights of the parties, not in relation to the conduct of the master.

Whether the insured is to recover according to the state of the subject at the time of the abandonment, or at the time of bringing the action, seems not to be fully settled; but admitting that the rights of the parties were fixed by the abandonment, the only subject which the plaintiffs had to abandon, after condemnation, was a right of appeal; and they had voluntarily relinquished that right. By the entry in the records of the court, an end was put to all further prosecution of the appeal. After this right was relinquished, an abandonment was an idle and useless ceremony; for there was nothing to abandon. The withdrawing of the appeal ought then to be considered as a waiver of the right to abandon. Again, the agreement with the captors was entered into before the abandonment; for Messrs. *Batard, Sampson & Sharp*, in their letter, dated the 1st of *June*, 1808, say, that in their letter of the 5th of *March*, they informed the plaintiffs that the master had gone down to *Pl mouth* to purchase the vessel, and that he had written that he had agreed with the captors for the purchase at 1,300 pounds; and that the original papers had been for

warded to *Plymouth*; so that the vessel was, in fact, in the possession of the master prior to the 1st of *June*, though the formal agreement was not executed until the 3d of *June*.

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Whether this is a total or partial loss, does not depend on the election of the insured. The case of *Abbott v. Broome* is not applicable. There the ship was condemned as incapable, from the injuries sustained by the perils of the sea, to proceed on her voyage, unless repaired at an expense equal to her value. In *Saidler & Craig v. Church*, the question whether there was a total or partial loss was not raised. The only point in controversy was, whether the act of the master did not amount to a waiver of the abandonment.

*Again, the defendants are not liable for the bottomry bond, nor for any charges of commissions or exchange. *Batard, Sampson & Sharp*, the correspondents, had no right to take a bottomry bond. In *Read & Jephson v. The Commercial Insurance Company*, (3 *Johns. Rep.* 352.) it was decided, that the insurers were not liable for a bottomry bond taken by a consignee for money advanced to the master for the use of the ship. In the case of *Rucker & Co. v. Conyngham*, (*Peters's Adm. Decis.* 295.) in the District Court of *Pennsylvania*, it was held that the *correspondents* of the owners cannot recover *marine* interest for money advanced to the master for repairs of the vessel. A master has no authority to execute a bottomry bond, unless in case of extreme necessity, and when there is no other means of procuring the money. (a) If he can obtain money on the personal credit of the owners, or has goods or funds in his hands, he cannot pledge the ship. If the goods of a stranger are on board the ship, they may be taken and sold by the master in a case of necessity. (6 *Johns. Rep.* 116.)

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Then look at the *bona fides* of this transaction. *Batard, Sampson & Sharp* charge commissions, &c., a premium of 21 *per cent.* on the whole bond, and the difference of exchange making in the whole about 1,134 pounds for an advance of about 1,900 pounds.

T. A. Emmet, in reply. The rights of the insured are not to be destroyed by the acts of third persons, without his knowledge or consent. *Batard, Sampson & Sharp* put in the claim in behalf of the plaintiffs, and withdrew the appeal. It was not the act of the master. They were strangers or volunteer agents, in a case of necessity, for the benefit of all whom it might concern. The acts of a mere volunteer agent cannot affect or destroy the rights of the parties. If, by the operation of law, the defendants had become liable for a total loss, the claimants must be considered as acting for them; for

(a) See Judgments in the Admiralty Court of *Pennsylvania*, by *Hopkinson*, in 1785 and 1786. *Appendix to Bee's Adm. Rep.* 339. 353. *Molloy*, b. 2. c. 11. s. 91.

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the abandonment retrospects to the time of capture. The master, *by the contract between him and the ship-owners, is their agent; but by the condemnation there was an end to his contract or employment as master. He was at liberty to return home; for he had no further duty to perform as master. Whatever he does after condemnation, must be considered as done by a volunteer agent, *ex necessitate*; and his acts affect those only whom it may happen to concern. Though his acts, done *bona fide*, may benefit the insured, they cannot be prejudiced by what he does *mala fide*. The master was not bound to prosecute the appeal, for he put in no claim; and he was not bound to enter a claim. If no claim had been interposed, the property would have been irrevocably fixed in the captors. Are the defendants, then, in a worse situation now, when, though a claim has been put in, the appeal, on deliberation and advice, was relinquished? Besides, the withdrawing the appeal did not destroy the rights of the insurers, for, by the statute of 33 Geo. III. c. 66. s. 29., any person may put in an appeal within fourteen days.

But if the master in this case acted *bona fide* in making the compromise, all parties must be bound. Counsel were of opinion that the sentence of condemnation would be affirmed, with costs. It was the duty of the master not to prosecute it; and while he discharged his duty by this arrangement with the captors, he incidentally conferred a benefit on the owners of the cargo. If nothing had been done, the defendants would have lost the whole. It was for their interest that the vessel should be sent back with her original papers, without which she would have lost her *American* character. This was a sufficient reason for giving a greater price than if she had been sold at auction. The purchase was, in truth, a *bona fide* transaction, and for the benefit of all concerned.

It is said that the vessel was restored before action brought; but it is settled, that the rights of the parties are fixed by the state of things at the time of the abandonment. *(*Mumford v. Church*, 1 Johns. Cas. 147. *S'ocum & Burling v. Unit. Ins. Co.* 1 Johns. Cas. 151. See also 4 Dal. 446. 4 Cranch, 29. 4 Mass. Rep. 238. But see 1 Caines's Cases in Error, 21. 3 Caines's Rep. 157.) But how can the vessel be said to be restored before action, when she comes charged with a bottomry bond to more than half her value, and for the payment of which she may be libelled and sold? On this ground alone, the plaintiffs have a right to abandon. Admitting that the master had no right to execute the bottomry bond, yet the defendants must be liable; for, rejecting the *marine* interest, the principal sum to be paid amounts to a technical total loss.

KENT, Ch. J., delivered the opinion of the court. Here was clearly a case of total loss. The vessel was captured and condemned, and it is not pretended that there was a breach of

warranty. The plaintiffs were, therefore, entitled to abandon, and they accordingly did abandon on the first of *June*, 1808. The master, in consequence of his abandonment, became the agent of the insurers, and the plaintiffs are not bound by his subsequent acts, unless they have adopted them. It was not in the power of the master, by any act of his, to change the total loss, thus fixed by the abandonment, into a partial loss, without the subsequent assent of the assured, and there is no evidence in the case of any such assent, or of any adoption of his acts. The purchase of the vessel by the captain was for the benefit of the insurer, if he chose to take it; and if he did not, still the refusal does not affect the abandonment, or the rights of the other party. These principles are well settled, and have frequently been brought into view in cases before this court. (*Saidler & Craig v. Church*, cited in 2 *Caines's Rep.* 286. *Abbott v. Broome*, 1 *Caines's Rep.* 292. *United Insurance Company v. Robertson & Hartshorne*, 2 *Caines's Rep.* 280.) In the case of *Miller & Graham v. Depeyster & Co.* (2 *Caines's Rep.* 301.) the master made a composition with the captor after a total loss followed by an abandonment, and the insurer was held to be answerable for the total loss, and to be *entitled to the benefit of the composition. (a) The master is not bound to prosecute the appeal. (3 *Term Rep.* 477.) There is no case which imposes this as an indispensable duty upon the master. He is only bound to act with good faith and sound discretion, in respect to the interest under his charge; and the compromise in this case appears to have been made under the influence of both these considerations. But whatever might have been the merit or demerit of his conduct, after the total loss became fixed, is immaterial in the present case. The purchase was not made until the 3d of *June*, and the loss continued total to the time of abandonment. If the captain had afterwards been wanting in a faithful discharge of his trust, he would have been answerable to the insurers.

The plaintiffs are, accordingly, entitled to recover as for a total loss, and the remaining inquiry is as to the principles upon which the accounts are to be adjusted, taking the ground of a total loss.

According to the settled construction of the general permission granted by the policy, to labor, &c., the insurer is liable

(a) If the abandonment be legal, it puts the underwriters completely in the place of the assured, and the agent of the assured becomes the agent of the underwriters. *Chesapeake Ins. Co. v. Stark*, 6 *Cranch*, 268. But the question whether the master is the agent of the owner or of the underwriters, depends upon the fact of a valid abandonment during the continuance of the total loss. If the vessel is abandoned while the loss continues total, all the intermediate acts of the master are the acts of the underwriters; but if the property be restored before abandonment, the right to abandon is gone, and the acts of the master will be considered the acts of the assured. *Pr. Walworth, Chancellor, in Dickey v. American Ins. Co.* 3 *Wendell*, 664. See also *Marshall v. Delaware Ins. Co.* 4 *Cranch*, 202. *Rhinolander v. Ins. Co. of Penn.* 3 *Id.* 29. *Depau v. Ocean Ins. Co.* 5 *Cowen*, 63.

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to expenses incurred in the attempt to recover the captured property, in addition to the payment of a total loss. The amount of the total loss chargeable upon the defendants is the sum subscribed, with interest thereon from the 1st July, 1808, and we are to determine what expenses they are chargeable with in addition to this subscription.

The defendants are chargeable with their proportion of the expenses incurred in endeavors to protect and reclaim the property prior to the time of the composition made by the captain; and these expenses are to be apportioned upon the principles of a general average. They were incurred for the joint benefit of the ship, freight and cargo, as all were equally put in jeopardy by the capture. The defendants ought not to be responsible beyond that share of the expenses which, upon the principles of a general average, will fall upon the vessel. The rule in *Maggrath & Higgins v. Church* (1 Coincs's Rep. 215.) does not apply to a case like this, where ship, freight and cargo belong to the same person, and when it does not appear that the other subjects are insured. Why should the plaintiffs recover the whole general average of the defendants, when they would, by that very act of recovery, and immediately upon receipt of the money, become answerable over to the defendants for that proportion of the average which ought to be borne by the cargo and freight? Nothing could be more disgusting than the operation of such a rule, and it would be perverting the very ground and principle of the other decision.

In calculating these expenses, the defendants are not to be answerable for *marine interest*, but only for the ordinary legal interest on the sums advanced. The defendants have never accepted of the ship, or chosen to avail themselves of the benefit (if a benefit it was) of the captain's purchase. Had they elected to affirm the purchase, and take the ship, they must have taken her *cum onere*, and with the encumbrance of the bottomry bond. But they were not bound to ratify that purchase, and as they have not done it, they have nothing to do with the vessel, or the bottomry bond, or the net amount of the freight, or of the sale of the vessel. They are only to pay the total loss, with their proportion of the expenses incurred in laboring for the safety and recovery of the vessel, freight and cargo, prior to the composition made with the captors. These expenses might undoubtedly have been raised by other means than by a bottomry bond, and that step ought not to be resorted to until all other means have failed. This was so held by this court in *Reade v. Commercial Insurance Company*; (3 Johns. Rep. 352.) and it is a well-settled rule on the subject. It is for this reason that the insurers are not here to pay *marine interest*; and that they have nothing to do with the purchase of the vessel, unless at their election, is a general principle in insurance, for which it will be sufficient here to

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refer to a passage in *Emerigon*: (Tom. 1. 470.) "The insurers are not bound to avail themselves of the benefit of a composition. It is sufficient that they pay the total loss when demanded. If they will not take to themselves the profit of the composition, they are still bound to pay the total loss, and in such a case they have no right to the subject repurchased; so there is no foundation for a claim upon them to contribute to the expense of the repurchase, as it is an act to which they are strangers, and which they are at liberty not to adopt, lest it might expose them to still greater loss."

Upon these principles, the referees mentioned in the case are to adjust the amount of the recovery.

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REED against PRUYN & STAATS.

SUDAM and *Benson*, for the defendants, moved at the last term, to set aside the execution in this cause. The affidavit of *Staats*, which was read, stated that a judgment was entered up in *August*, 1808, against the defendant *Staats*, in favor of the plaintiff, on which a *ca. sa.* for 436 dollars and 60 cents was issued to the sheriff of *Columbia*. *Staats* was taken by a deputy sheriff on the execution, and discharged on his procuring *Pruyn*, the other defendant, to join in the execution of a bond and warrant of attorney, as security, and judgment was entered up thereon, in favor of the plaintiff against the defendants. About 7 or 8 days thereafter, *Henry Van Slyck*, the deputy sheriff, called on *Staats*, and informed him he had a *ca. sa.* issued on the last judgment, and offered to lend the money to him to discharge *the *ca. sa.* if *Staats* could procure a note drawn by *Pruyn*, and endorsed by *Staats*, payable at the *Hudson* bank, for about 560 dollars. *Staats* and *Pruyn* afterwards called on the deputy sheriff, who drew a note for 563 dollars, payable to *Staats* or order, at the bank of *Hudson*, 55 days after date, dated *November 3*, 1808, which was accordingly signed by *Pruyn*, and endorsed by *Staats*. The deputy told the defendants he had a *ca. sa.* against them, at the suit of the plaintiff; and being requested to produce it after the note was given, he showed a *fi. fa.*; and the defendants expressed their dissatisfaction at his conduct, and demanded a discharge of the execution. The deputy sheriff gave them a receipt, stating that he had received 495 dollars and 87 cents, with the sheriff's fees, in full of the execution against the defendants at the suit of the plaintiff in this cause. On the 1st of *May*, 1809, *Staats* paid the deputy 50 dollars, on account of the note. He

Asheriff cannot, with his own money, pay the plaintiff on an execution, and afterwards levy the execution out of the property of the defendant; nor can he take a bond or other security, and detain the execution in his hands, and use it afterwards to enforce the payment of the money advanced by him. (a)

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(a) Vid. *Love v. Palmer*, *sup.* 159, note a. See also *Hoyt v. Hudson*, 12 Johns. R. 201 *Jackson v. Anderson*, 4 Wendell, 474.

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afterwards applied to the plaintiff, to enter up satisfaction on the judgment, who informed him that he never had any judgment against the defendants, in this suit, and that he had received his money on the judgment against *Staats*. *Pruyn* died in *September* 1810; and in *October*, the deputy sheriff advertised the personal property of *Pruyn* and *Staats* for sale, on the execution in this cause. On the 2d of *October*, 1810, the deputy requested *Staats* to give a bond and warrant of attorney for the amount of the note, and that he would pay off the executions he held against *Staats*, and would give the defendant 2 or 3 years to pay the judgment, alleging that he had lent the defendant money to pay off the judgment of the plaintiff.

It appeared from a certificate of the attorneys of the plaintiff in the suit of *Reed* against *Staats*, that an execution was issued the 20th of *October*, 1808, to the sheriff of *Columbia*, for 436 dollars and 60 cents, debt and *costs, and that they had received the said sum in full of damages and costs, besides the sheriff's fees.

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Sudam cited 19 *Vin. Abr.* 435. § 6. 1 *Lutw.* 589. *Noy*, 107

Van Buren and *E. Williams*, contra, read the affidavit of *Henry Van Slyck*, the deputy, stating that he received the *fi. fa.* against the defendants in this cause the 30th of *October*, 1810, for 494 dollars and 37 cents; that he called on the defendant *Staats*, who said he could not raise the money, and applied to the deponent to lend it; that he agreed to advance the money and take a note, which it was supposed could be discounted at the *Hudson* bank, and the deponent gave a check on the bank, in that expectation, to the defendant. But the note was never discounted; and after it became due, no notice was given to the endorser, so that he became discharged; and *Pruyn* refused to pay the note. That on the repeated promises of *Staats* that the deponent should be paid, all proceedings were delayed until he advertised the property. That he never had a *ca. sa.* against the defendants, and he showed them the *fi. fa.* before the note was given.

KENT, Ch. J., delivered the opinion of the court. The execution, against which the defendant *Staats* prays to be relieved, ought to be considered as satisfied and discharged. The deputy sheriff who had the execution, instead of executing it according to law, discharged it himself out of his own money on taking a note drawn by one defendant, and endorsed by the other, payable at the bank of *Hudson* in 55 days. This he did as early as *November*, 1808, and gave the defendants, under his own hand, an acknowledgment of having received the full amount of the execution. The note not being paid, and having neglected to fix the endorser by the *requisite notice, the deputy sheriff now proceeds to indemnify himself, by putting

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the execution in force, which had slept quietly for two years. Such management of the process of execution by the officer, is not to be permitted. It is liable to infinite abuse and oppression. The law has long since, and very wisely, guarded against such application of its process. In *Waller v. Weedale*, (*Noy*, 107.) it was laid down by the C. B. that the sheriff on *fi. fa.* cannot detain the goods taken upon an execution in his own hands, and satisfy the debt of his own proper money, for "a grand inconvenience would ensue, if the sheriff himself might detain them." This case received strength and credit in *Langdon v. Wallis*, (1 *Lutw.* 589.) when it was cited as good law by such counsel as Sergeants *Wright* and *Lutwyche*. It was there observed, that the law requires of sheriffs a strict execution and observance of writs, as their authority was to sell the goods, and the doctrine appeared to be approved by the decision of the court.

It was once moved as a question by Lord *Hobart*, in *Speake v. Richards*, (*Hob.* 206.) whether, if the sheriff on execution pay the plaintiff with his own money, he might afterwards levy the money of the defendant. But this point, if not essentially involved in the decision in *Noy*, seems to be embraced by the decision in the K. B., in *Ward v. Hauchel*, where it was agreed by the court, that if the sheriff takes a bond from the party, on *fi. fa.*, it was pleadable in bar of a new execution, and the court referred to a case in which such a plea had been adjudged good. (1 *Keb.* 551.) This authority clearly applies to the present case. The sheriff must look to his note; and it would be oppressive to allow him to keep an execution alive over the party, after having formally paid it himself, and accepted of a note as his own security.

*The practice of sheriffs of paying executions themselves, and taking security and judgment bonds from the party over whom they have at the time such means of coercion, is to be strictly and vigilantly watched by the courts. Such humanity is imposing, but it may be turned into cruelty. Nothing is more important to the honor of the administration of justice, than that the officers of the court should not use its process as the means of making unequal bargains, and taking undue advantage. The facts in this case have the appearance of an instance of gross abuse. The whole debt, costs and poundage, that the defendant *Staats* was originally bound to pay on the *ca. sa.* issued in favor of the plaintiff in *October*, could not exceed 445 dollars. He gave a judgment bond, with surety, for the amount of that execution, and immediately another execution issued against him and the surety for 494 dollars and 37 cents; whereas the cost of entering up the judgment bond could not have been more than 18 dollars. On this second execution he gave a note for 560 dollars. Here is, then, by this management of taking a judgment bond to meet the first execution, and of taking a note to meet the second execution,

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an accumulation of debt to more than 100 dollars beyond any estimate that I can possibly make of legal charges; and this enormous *extra* accumulation of charge upon this oppressed defendant, accrued within the short space of ten days. Such conduct is not to be sanctioned or endured.

I am happy, therefore, that *Van Slyck*, the deputy sheriff, will be driven to seek his remedy upon the note, when the legality of this increase of the original debt will be open to further investigation.

The court are of opinion that this motion to set aside the execution be granted, with costs, to be paid by *Henry Van Slyck*, the deputy sheriff.

Motion granted.

[* 431] *M'BRIDE *against* THE MARINE INSURANCE COMPANY.

The wages of the crew, during a detention by an embargo, are not chargeable to the ship, nor are they general average, but fall exclusively on the freight. (a)

If the ship is abandoned to the insurer, and he accepts the abandonment, it seems he is entitled to the subsequent freight; and the subsequent wages of the crew will be chargeable to him as owner, but not as insurer. (b) If the insurer does not accept the abandonment, he can be liable only for a total loss, and the necessary expenses incurred in laboring for the safety and recovery of the subject insured; in which may be included the expenses of wharfage and of selling the ship. (c)

HARRIS and *T. A. Emmet*, for the plaintiff, moved for leave to issue execution on the judgment given in this cause, in February term, 1810, (see 5 *Johns. Rep.* 299.) for a sum which should include 1,304 dollars and 66 cents, for the wages of the crew of the vessel from the time she was embargoed, until the defendants assented to their being paid off and discharged, that is, from the 5th of January to the 7th of June, 1808, and 425 dollars and 84 cents for disbursements, from the 9th of June, 1808, to the 8th of June, 1809, when the ship was sold; and also for the expenses of the sale and wharfage of the ship.

It appeared that the ship was detained by the embargo, at *North Carolina*, and the plaintiff abandoned on the 19th of January, 1808, but the defendants refused to accept the abandonment. The plaintiff made repeated offers to the defendants to have the crew paid off, and the ship dismantled. On the 24th of May, 1808, the defendants agreed, in writing, that the ship should be dismantled, and crew discharged, which was accordingly done; and the ship was brought to the wharf. On the 5th of August, 1808, the ship sprung a leak, and it became necessary to land her cargo, part of which was damaged. The expense of unlading was 60 dollars, and the expense of selling the damaged part of the cargo, and storing the sound part until the voyage was broken up, and the ship sold, amounted to 600 dollars more. On the 20th of August, 1808, the plaintiff requested the defendants to consent to have the ship sold, but they refused. In April, 1809, the plaintiff again applied to the defendants to accept the ship, or consent to have her

(a) See *Barker v. Phoenix Ins. Co.* 8 *Johns. R.* 307.

(b) *Marine Ins. Co. v. United Ins. Co.* 9 *Johns. R.* 186.

(c) *Jumel v. Marine Ins. Co.* *supra*, 412.

sold; but they refused. By an agreement, however, dated the 8th of *May, 1809, the defendants consented to a sale of the ship.

In the action on the policy, the plaintiff took a verdict by consent, for 10,651 dollars and 39 cents; but the exact amount was to be afterwards liquidated by the parties. The court were of opinion that the plaintiff was entitled to recover on the abandonment for a total loss; but in liquidating the amount, the defendants refused to allow the *wages* of the crew, during the detention of the ship, the *expenses* for *unloading* the cargo, &c., and the expenses of the *sale and wharfage*.

Harris cited 1 *Caines's Rep.* 276. 215. 5 *Johns. Rep.* 310. *Peake's N. P.* 71. *Marshall on Insurance*, 721. 1 *Term Rep.* 127. 4 *Term Rep.* 206. 4 *East*, 34.

Colden, contra, cited 1 *Caines's Rep.* 573. 3 *Caines's Rep.* 155.

Per Curiam. The wages of the crew during the detention of the ship by the embargo, and until they were discharged, were not covered by the policy upon the ship. They do not even go into a general average, but fall exclusively upon the freight. This general rule has been often admitted. (1 *Term Rep.* 127. *Buller, J.*, in 2 *Term Rep.* 414. 3 *Caines's Rep.* 155. 4 *Dallas*, 246.) The foreign authorities on commercial law speak the same language. (*Ord. de la Marine*, lib. 3. tit. 7. art. 7. *Pothier, Traité des Chartes-Partie*, No. 85. *Ricarde Négoc. d'Amsterdam*, p. 279.) But it is said, that upon a valid abandonment, the subsequent freight belongs to the insurer upon the ship. This is undoubtedly the better opinion. It does not, however, follow, that the insurer is responsible for this charge upon his contract of insurance. If he accepts the abandonment, the subsequent wages will be chargeable to him, as owner, and not as insurer. In this case, the defendants would not accept of the abandonment, and the plaintiff might *have sold the ship according to the decision in *Waldens v. The Phoenix Insurance Company*, (5 *Johns. Rep.* 310.) But if the plaintiff, instead of selling the ship, or laying her up and discharging the crew, thought proper to continue the crew in service and under wages, he cannot make that expense a charge under the policy on the ship. In addition to the payment of a total loss, the insurer is answerable only for the necessary expenses incurred in laboring for the safety and recovery of the subject insured. His contract reaches to no other charge, and the detention of the crew was not requisite for that purpose. As the sovereign who lays the embargo, says *Ricard*, does not claim the ship or cargo, but only detains them, it cannot be said that the crew remain on board to prevent an entire loss. The crew, says *Pothier*, are main-

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tained during the detention, at the exclusive expense of the owner; for he owes their services to the shipper for the voyage, and the price of their services is embraced by the freight

The next charge made by the plaintiff was, the expense of unloading the cargo and the storage of it; but this *item* was properly abandoned by the counsel, as totally untenable. The authority of the books is expressly against it. (1 *Emerig.* 539.)

The last charge is, the expense of the sale and wharfage of the ship. These are proper charges, and ought, in this case, to be deducted from the amount of the sale of the ship, and the defendants ought to be credited with the net amount of the sale, after deducting the actual expenses of the sale and the wharfage. The expense of wharfage must have been necessarily incurred, in taking care of the vessel. It was requisite to her safe-keeping; and if any difficulty occurs, in the liquidation of these last charges, between the parties themselves, it must be referred to Mr. *Ferres* to ascertain the amount, which, together with the costs of this motion, must be paid by the defendants.

Judgment accordingly.

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*MOUNT & WARDELL against G. & R. WAITE.

A *wager contract* is void, if it is against the principles of public policy. (a)

The insurance of lottery tickets is against public policy, especially since the act of the 7th April, 1807, made to restrain the insurance of lottery tickets, declares it to be a public misdemeanor, to insure tickets in lotteries authorized by this state; and the act of the 17th February, 1809, has extended the provisions

THIS was an action of *assumpsit*. The declaration contained five counts. The first count stated that the defendants were joint partners, as *stationers* and *lottery office keepers*, and used the trade of purchasing, selling and *insuring lottery tickets*; and that, on the 27th *January*, 1808, a discourse was held between the plaintiffs and defendants, concerning a lottery, called the *Baltimore Grand Lottery*, and of and concerning the drawing of certain tickets, on the *thirteenth* day of the drawing of the said lottery, and it was then agreed by the defendants, that if the plaintiffs would pay to them 83 dollars and 33 cents, the defendants would pay to the plaintiffs 2,000 dollars, in case the ticket No. 167, in the said lottery, was drawn on the thirteenth day of the drawing; and the plaintiffs averred that they paid the defendants the sum of 83 dollars and 33 cents, and the defendants, in consideration thereof, assured and promised, &c., by reason whereof, &c.

The *second* count stated the same promise in writing.

of that act to all lotteries whatever, foreign or domestic; and though the action was on an insurance of tickets in a *foreign* lottery, and made prior to the act of 17th Feb. 1809, (sess. 32. c. 36.) the contract was held to be void. But the insured not having violated any statute, was held not to stand *in pari delicto*, and, therefore, entitled to recover back the *premium* paid for the insurance.

(a) Vid. *McCullum v. Gourlay*, 8 *Johns. R.* 147. *Lansing v. Lansing*, *Id.* 454. *Campbell v. Richardson*, 10 *Johns. R.* 406. *Vischer v. Yates*, 11 *Johns. R.* 23. *Yates v. Foot*, 12 *Johns. R.* 1, reversing the judgment in the preceding case. *Rust v. Gott*, 9 *Cowen*, 169. *Brush v. Keeler*, 5 *Wendell*, 250.

The third count stated that a conversation, &c., and that the defendants agreed, that if the plaintiffs would pay to them 12 dollars and 50 cents, the defendants would pay to the plaintiffs 100 dollars on such and each of the tickets, No. 7,000, No. 8,000 and No. 9,000, in the said lottery, as should be drawn on the *thirteenth day* of the drawing of the said lottery; and the plaintiffs averred that they paid the defendants the sum of 12 dollars and 50 cents; and that the ticket No. 8,000 was drawn on that day. By reason whereof, &c.

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The fourth count stated the promise to be in writing.

*The fifth count was for money had and received to the use of the plaintiffs. Plea, *non assumpsit*.

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The cause was tried before Mr. Justice *Spencer*, at the *New-York* sittings, the 13th of *April*, 1810.

At the trial, the plaintiffs proved the agreements and promises in writing, as stated in the second and fourth counts. A witness testified, that on the day the account of the tickets drawn in the lottery on the 13th day of drawing, arrived in *New-York*, one of the defendants told the witness that they, the defendants, had been *hit* by the plaintiffs, in the sum of 2,000 dollars, on No. 167, and in 100 dollars on No. 8,000, which tickets had come out on the 13th day of drawing the said lottery; and that the plaintiffs had called and demanded payment of the 2,000 dollars and the 100 dollars; but the defendants had refused to pay, and intended to resist payment.

A verdict was taken for the plaintiffs, by consent, subject to the opinion of the court, on a case containing the above facts.

Griffen, for the plaintiffs. This is an action for a wager. The laying the wager, and the loss, appear from the case. Is there any rule or principle of law which can prevent the recovery of the plaintiffs? The objection of illegality comes with an ill grace from the defendants, who are the authors of these insurances of lottery tickets. In *Bunn v. Riker*, (4 *Johns. Rep.* 436.) it was admitted that an action at common law might be maintained for a wager, unless against the principles of public policy.

It cannot be said to come within the act to *prevent private lotteries*, (6th sess. c. 12.)† which declares that no person shall set on foot, carry on, &c., within this state, any lottery, game, or device of chance of any nature or kind whatsoever, &c. The words, *game or device of chance*, are intended merely as descriptive of private lotteries, the *object of the act, which was not intended as an act against gaming. The penal clause, which says that the person offending shall forfeit the whole amount “for which *such lottery* was made,” shows that it had in view private lotteries only. The prohibitory cannot be considered more extensive than the *penal* clause. The other provisions of the act, and the words *prize, blank, drawing*, all refer to private lotteries.

† 1 R. S. 668
sec. 27.

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† 1 R. S. 662.

It is not within the spirit of that act, nor of the decision in *Hunt v. Knickerbacker*, (5 *Johns. Rep.* 327.) The court merely decided, that no action can be maintained on the sale of lottery tickets of another state. Nor is it within the 5th section of the act to *prevent horse-racing, &c.* (25th sess. c. 4. s. 5.) † which declares all contracts made “for or on account of any sum or sums of money, or other thing bet or staked, depending on any such race or races, or for, or on account of any gaming by bet or chance of any kind, or under any description whatsoever, to be void in law.” In common parlance, the insurance of lottery tickets is not gaming.

In *England*, various statutes have been passed to prevent gaming, particularly those of the 16 *Car. II. c. 7.* and 9 *Ann. c. 14.* (3 *Bac. Abr. Gaming, B.* 14 *Vin. Abr. Gaming, B.*) which contain words equally general and comprehensive as any of our statutes. There have been various decisions in *England* since these statutes; and it has been held that a wager concerning the manner of playing was not within the statute, because it was a mere collateral matter, which happened on a mere chance, and did not depend on the success of the game; for had other wagers been intended, mention would have been made of them. (*Lutwyche*, 487.) In *Decosta v. Jones*, (Coup. 728. 734.) Lord *Mansfield* said, “that indifferent wagers upon indifferent matters were allowed, in so far as they have not been restrained by particular acts of parliament;” and where parliament interposes, “it implies, that, in cases not specially prohibited, parties may wager or insure at pleasure.”

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*In *Good v. Elliot*, (3 *Term Rep.* 693.) *Grose, J.*, said, actions for wagers had been innumerable, and that what was said by Lord *Mansfield*, in *Decosta v. Jones*, was decisive; and he held the argument, that they were void as gaming contracts, and, therefore, against sound policy, not to be well founded.

These decisions show, that the words in the statute, “any gaming,” &c., do not apply to wagers. An act was passed the 7th *April*, 1807, (sess. 30. c. 181.) † to restrain the insurance of lottery tickets. If the acts relative to gaming extended to the insurance of tickets, then this act was unnecessary. Again, in *February*, 1809, (sess. 32. c. 36.) § another act was passed, extending the act of *April*, 1807, to the insurance of tickets in all lotteries whatsoever, public or private, foreign or domestic. These acts, being passed *in pari materia*, should be taken together; and it is to be implied that, in the sense of the legislature, it was, before the passing of those acts, lawful to insure lottery tickets; for it cannot be supposed that the legislature would be so unreasonable as to make laws in cases already provided for, and which were idle and useless.

† 1 R. S. 667.
sec. 36.

§ 1 R. S. 667.
sec. 36.

Woods, and *T. A. Emmet*, contra. If the defence set up by the defendants is legal, they have a right to it; and if the effect

of it will be to destroy the business and occupation of the defendants, so much the better for the community.

We shall contend that this contract is void as against law, and public morality.

1. In *Hunt v. Knickerbacker*, (5 Johns. Rep. 327.) the sale of tickets in lotteries of other states was declared to be a public nuisance, and within the spirit of the act for the prevention of private lotteries. Surely this insurance can stand on no better foundation than an insurance of the lottery tickets of this state. The preamble to the act to prevent private lotteries, states that "private lotteries occasion idleness and dissipation, and have been productive *of frauds and impositions." Do not insurances of tickets produce the same mischiefs? The third section of the act declares, that if any person shall purchase any ticket in such lottery, or in any other way become an *adventurer therein*, he shall be punished. Does not a person who pays a *premium*, or *bonus*, for the insurance of a prize in a lottery become an adventurer in such lottery?

Again, the 5th section of the act to prevent horse-racing, &c., declares all contracts, &c. on account of any gaming by lot or chance of any kind, &c. void. Is not the insurance of lottery tickets gaming by lot or chance? In *Bunn v. Riker*, Mr. Justice *Van Ness* inclined to think that this act made all wagers illegal; though the court gave no decided opinion on the construction of the act. But, admitting that a wager on a contingent event is not gaming within the meaning of that act, yet a wager depending on a fortuitous event is a gaming by lot or chance. This is a wager policy of insurance, on a subject which has been declared to be a common nuisance. The Supreme Court of *Massachusetts* (2 Tyng's Rep. 1. *Amory v. Gilman*) has decided, that a wager policy of insurance was illegal and void. The insurance of lottery tickets is much more deserving of condemnation than a contract founded on an innocent commercial adventure.

2. Suppose, however, that this species of insurance is not prohibited by statute, it does not follow that it is not void, as being against public policy. The practice of insuring lottery tickets was found to be an enormous public evil, and, on account of its immoral and pernicious effect, the legislature passed those statutes. Doubts existed in the minds of some, as to the illegality of such contracts, and the legislature very wisely removed such doubts. What higher evidence can exist of this practice being against public policy than this legislative declaration? Though the defendants may not be liable to the penalties of the act of 1807, they are clearly within *the spirit and policy of that act. If insurances in the public and established lotteries of the state were illegal, as against public policy, the insurance of tickets in the lotteries of other states must be held to be equally against law and policy.

3. The plaintiffs cannot be entitled to a return of premium

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in this case. In *Van Dyck v. Hewitt*, (1 *East*, 96.) it was held that the premium paid on an illegal insurance could not be recovered back. The maxim is, that where both parties are *in pari delicto*, *potior est conditio possidentis*. The same principle was laid down in *Morck and another v. Abel*, (3 *Bos. & Pull.* 35.) by Lord *Alvanley*, in the common pleas.

Boyd, in reply. After the solemn decisions in *England*, and in our courts, it is now too late to say that all wagers are illegal and void. If, then, this contract is not of itself void at common law, is it a contract against any statute, or the principles of public policy? The act of 1807 declares it shall be unlawful to insure; thereby, implicitly declaring, that before that time it was lawful. All the cases in the *English* courts, deciding wagers to be void, as against *public policy*, related either to courts of justice, the public affairs and concerns of the government, as its revenues, or public elections, &c., or such as concerned the feelings of private persons. (*Cowp.* 37. 2 *Term Rep.* 610. 1 *Term Rep.* 56.) The statute of 29 *Geo. III.* c. 47. was passed to restrain and prohibit the insurance of lottery tickets. In *Jacques v. Golightly*, (2 *W. Black.* 1073.) the court held, that the insurance of lottery tickets was not criminal, but was made void by statute; and that the premium paid might, therefore, be recovered back. Suits have also been sustained, in *England*, to recover money fairly won at play, in cases not precisely within the statutes against gaming. (1 *Esp. Cas.* 18. 235. 2 *Str.* 1249. 2 *Burr.* 1078.) All our statutes about gaming, &c. are to be construed together, as one law, (*Doug.* 30. 1 *Inst.* 380. b. *Hard.* 344. 1 *Show.* 108.) and they clearly show the understanding of the legislature, that such insurances were not, in themselves, illegal.

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The plaintiffs, at all events, are entitled to recover back the premium. (7 *Term Rep.* 535. 2 *Esp. Rep.* 629. But see 1 *East*, 98.)

KENT, Ch. J., delivered the opinion of the court. There are two questions arising upon this case. 1. Are the plaintiffs entitled to recover the sums insured? 2. Are they entitled to a return of the premium?

1. A wager contract is void, if it be against the principles of public policy, equally as if it contravened a positive law. This was so decided in the case of *Jones v. Randall*, (*Cowp.* 37.) And the contracts in question appear to me to be clearly within the mischief, and against the policy, indicated by the act of the 7th of *April*, 1807, made to restrain the insurance of lottery tickets. Without adverting to other considerations which were urged upon the argument, this objection is decisive. The statute declared it to be a public misdemeanor, "to insure for or against the drawing any ticket, or to receive any money in consideration of any agreement to repay any sum, if any

such ticket should prove fortunate or unfortunate, or any other chance or event relative to the drawing of any such ticket, in any lottery authorized by law." The provisions in the statute do not reach this case, because the contract related to tickets in a *foreign* lottery; but the act of the 17th of *February*, 1809, extended the penalties and provisions of the act of 1807, to all lotteries, public or private, foreign as well as domestic. This last statute was subsequent to the making of the contracts before us, and therefore they are not within that statute. But can we say, after the passing of the first act, that these contracts were not against public policy? If it was a crime to make such a contract relative to a ticket in a lottery authorized by law, could it be deemed fit and politic to uphold such a contract relative to a ticket in an unauthorized lottery? I think not; and that, though the penalties of the act of 1807 do not apply to the case, so as to render the defendants indictable, yet the policy of the statute clearly applies, and ought to vacate the contract.

2. With respect to the return of premium, the *English* authorities differ widely. They are in direct contradiction to each other, and there does not appear to be any well settled rule on the subject. We are certainly at liberty to follow those decisions of which our judgment most approves. The plaintiffs here committed no crime in making the contract. They violated no statute, nor was the contract *malum in se*. I think, therefore, the maxim as to parties *in pari delicto* does not apply, for the plaintiffs were not *in delicto*. We declare the contract void on principles of policy derived from the statute; but it would be unconscientious for the defendants to retain the premium, and we promote justice by compelling them to refund it. If the plaintiffs, in making the contract, had shown depravity of character, by the immorality of the contract, or disobedience to law, by an attempt to evade or resist it, I should then have been inclined to deny any assistance to them in the recovery of the premium. The authorities that are in point in favor of the return of premium in this case, and which I choose to follow, are *Jacques v. Golightly* (2 *Black. Rep.* 1073.) and *Licansade v. White*, (7 *Term Rep.* 535.)

The opinion of the court, accordingly, is, that the plaintiffs are entitled to the return of premium, and no more.

Judgment accordingly.

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THIS was an action of *assumpsit* for money had and received to the use of the plaintiffs. The cause was tried at the *New-York* sittings, in *April*, 1810, when a verdict was taken for the plaintiff for 3,139 dollars and 94 cts, subject to the opinion of the court on the following case:—

A. sent a bill drawn on B., in *London*, endorsed to C., his agent in *New-York*, who sold and endorsed it to D., who remitted it to E. in *London*, to pay a debt due from D. to E. The drawee refused to accept the bill, which was regularly protested for non-payment, and the protest, with the first of the set, was returned to D. on the 4th of *October*, 1808, who gave immediate notice to C., who paid to D. the amount of the bill on the 5th of *October*,

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with 20 per cent. damages. On the 20th of *August*, 1808, a few days after the protest, the drawee paid the amount of the bill and all charges, on the second of the set of exchange, to E. in *London*, which was not known in *New-York*, when the first of the set was paid by C., though notice was regularly sent by E. to D., and afterwards received. On the day on which C. paid to D. the amount of the bill and damages, D. remitted a sum to E. in *London*, to pay the debt for which the bill had been remitted, and for another sum which would shortly be due.

In an action for money had and received, brought by A. against D., to recover back the amount paid to him on the first of the set of exchange; it was held, that the payment after protest, to E., the endorsee and holder of the second of the set of exchange, was good and valid; that the dishonor of the bill was waived by the holder, before the payment to D. in *New-York*; and that A. was entitled to recover back the money as paid under a mistake. (a)

(a) The principles upon which an action will be sustained for money paid by mistake, are examined at large in the case of *Mowatt v. Wright*, 1 *Wendell*, 355. See also *Waite v. Leggett*, 8 *Cowen*, 195. *Clarke v. Dutcher*, 9 *Cowen*, 674

as agents of *Pigou & Co.*, and which, with the former balance, would equal or exceed the sum of £939 10s. 7d. The accounts between the defendants and *Pigou & Co.* had been balanced by the defendants, without noticing the £500 paid to *Pigou & Co.* on the bill; and *Pigou & Co.* had not furnished any accounts taking notice of the bill.

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Harris, for the plaintiffs. The money was paid in this case, under a mistake of fact. (*Doug.* 638. 1 *Term Rep.* 285.) The plaintiffs did not know, at the time, that the bill had been paid in *London*, and had that fact been known to them, they would not have paid the money.

The defendants in this case were not the agents of *Pigou, Andrews & Wilkes*. They remitted the bill in their own names, and guarantied its payment. It was remitted in payment of a debt. In *Thompson v. Robertson & Browne* (4 *Johns. Rep.* 27.) it was decided, that the holder, or person to whom a bill is remitted, after the protest, is the agent of the remitter.

*If the defendants were agents, they were not entitled to damages; and the person to whom a bill is remitted in payment of a debt cannot recover damages in case of a protest. (1 *Johns. Cas.* 107. 1 *Dallas*, 26. 4 *Dallas*, 153.)

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If a suit had been brought against the present plaintiff, on the return of the *first* of the exchange, and before trial information had been received by them of the bill having been paid in *London*, they could have availed themselves of this payment, in their defence. (4 *Johns. Rep.* 144.)

Damages on bills of exchange are given in lieu of reëxchange, and the costs and charges. In the present case there was no reëxchange, and so the defendants are not entitled to the 20 *per cent.* damages.

If the defendants have received the money of the plaintiffs, and had the use of it, they ought to pay interest.

Colden and Hoffman, contra. No doubt, where the same debt has been paid twice, under a mistake, one of the payments must be refunded. But the question is, Which was the rightful payment? When the bill was returned protested, the defendants had an absolute and vested right to the amount of the bill, with damages; and they were not bound to wait, after a regular protest for non-payment, to see whether the bill might not eventually be paid in *England*. Such a doctrine would create the greatest uncertainty and inconvenience in commercial transactions. The plaintiffs engaged to the defendants that the bill should be accepted, and paid when it became payable. A right of action attached against the plaintiffs, when the bill was protested for non-payment; and the right of the defendants to recover of the plaintiffs the amount of the bill with damages, became absolute. A protest of the *first* of the set was a protest of the whole. The contract of the plaintiffs was

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broken, and the defendants had a legal and perfect right to the damages. Have they, by themselves, or by their *agents, done any act to waive this right? *Pigou & Co.* were the agents of the defendants no further than to receive the money on the bill, and to return it immediately, if protested. After the protest, their agency was at an end, and they had no authority, after the first of the set had been returned with protest, to make an arrangement with the drawees, so as to affect or destroy the rights of the parties under the protest. On a protest for non-acceptance, the holder may recover the amount of the bill with damages; and suppose they have been paid or recovered on a protest for non-acceptance, and the bill, on arriving at maturity, has been afterwards paid, can the endorser or drawer recover back the damages he has paid?

Suppose a vessel sunk at sea, and a right of abandonment vested and loss paid, and the vessel afterwards is recovered, can the insurers recover back the money paid for a total loss? It is said that the defendants have sustained no damages; but their credit with *Pigou & Co.* was diminished to the amount of the bill.

We admit that the plaintiffs have a right to recover back the money they have paid from some person, but not from the defendants. If the drawees had funds in their hands, they are answerable for not accepting the bill. If the drawers had no right to draw, they are entitled to no remedy. If *Pigou & Co.* have received money which they had no right to receive, they are answerable. After the return of the bill, they ceased to be the agents of the defendants, and acted at their peril. The defendants have not been in fault. They had a legal right to the money when they received it; and the rights of the parties must be determined as they stood at that time.

The plaintiffs cannot be entitled to *interest*, for the defendants had no use of the money, having remitted it immediately to *London*.

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**T. A. Emmet*, in reply. In *Thompson v. Robertson*, the only question was, who was entitled to the 20 *per cent.* damages. *Palmer* refused to take the bill in payment, and the court said that he was a mere agent, and not entitled to the damages. The bill was not remitted in the ordinary course of commercial transactions. The point decided was, that as between the remitter of a bill to pay a debt, and the creditor to whom it was remitted, the latter is not entitled to damages in case of a protest.

An endorser is a conditional security, and he has no right of action on the bill against the other parties until he has paid it. How then have the plaintiffs broken their contract? The engagement of an endorser is, that he will pay the money, if the drawee does not. The plaintiffs endorsed the bill to the defendants, by whom it was endorsed and remitted. The de-

defendants, when the bill was dishonored, were not called on to pay, and so they had no right to call on the plaintiffs. The only persons who could call on the defendants were the endorsees in *England*, and before applying to the defendants, they actually received the money there. Suppose *Pigou & Co.* had sued the defendants, as endorsers on the bill, could they not have pleaded or set up the subsequent payment? The bill was, in fact, paid in *London*, before the money was paid here. There was no liability, therefore, on the part of the defendants as endorsers, to pay the bill, when they called on the plaintiffs and received the money. A payment of one of a set is a payment of the whole. If the principal and all charges and expenses were paid in *London*, on what ground can the 20 *per cent.* damages be claimed here? *Pigou & Co.* were not agents of the defendants. They held the bill in their own right, as endorsees. They returned the *first*, but retained the *second* of exchange. They had a right, as holders of the *second* bill, to receive the money of the drawees. The payment to them was a valid one. And the money having been paid by the drawees, the responsibility of *every other party on the bill was discharged, and at an end. The plaintiffs cannot recover the money of *Pigou & Co.*, for they had a right to receive it. If the payment in *London* was rightful, every subsequent payment was wrongful. That payment is rightful which is paid to the person who has a right to receive the money, and the power to enforce its payment in a court of justice. *Pigou & Co.* had this right and this power, and the payment to them was, therefore, rightfully made.

It is said, that the rights of the defendants were vested and fixed by the protest. Admitting this to be so, yet if payment is made before an action is brought, it divests the right of action.

If the duty of *Pigou & Co.* was merely to receive the money, or return the bill, why did they not return the whole set? If they are to be deemed agents of the defendants, it is a case where both the principal and agent are entitled to receive; and if the payment is first made to the agent, it will defeat a subsequent payment to the principal. Commercial agents residing abroad are, in regard to persons residing here, considered as principals. The plaintiffs are not bound to look to persons beyond the jurisdiction of the state.

The plaintiffs were not bound to inquire or know in what character the defendants purchased and remitted the bill. The questions between remitters and the persons to whom bills are remitted, or between principals and agents, arise only between the immediate parties, and not between them and third persons.

Per Curiam. When notice was given to *McBride* of the non-payment of the bill, it had already been paid by the

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drawees to *Pigou & Co.* All the three of the set of exchange formed but one bill, and a payment to the holder is good, whichever of the set he may happen to have in his possession. This must be considered as a valid payment by the drawees, although it was after protest for *non-payment, because *Pigou & Co.* were holders of the bill as general endorsees, and the legal title was in them. *Miller & Co.* had a right to consider them as owners of the bill, and as owners they could waive the default and accept the payment. They did not hold the bill under any special or limited endorsement. The notice to *McBride*, and the subsequent payment by him, were consequently founded in mistake. It was done upon the assumption of a fact which did not then exist. The bill was not dishonored when the payment was made by *McBride*, as that dishonor had been duly waived by the party competent to waive it. A drawee, as well as a third person, after he has suffered a bill to be protested for non-payment, may pay it *supra protest*. (*Chitty on Bills*, 163.) This case then resolves itself into the ordinary case of money paid by mistake of the fact, and the plaintiffs are entitled to recover back the whole sum paid, with the 20 *per cent.* inclusive, and interest; and judgment must, therefore, be entered upon the verdict as it stands.

VAN NESS, J., *dissented*. He thought that after the bill had been protested for non-acceptance and non-payment, and sent back by the holder in *London* to the defendants here, the drawees paid the money to the holders in *London*, at their peril. That the different bills of the set made but one bill of exchange; and when one of the set was received by the defendants here with the protest for non-payment, their right to receive the money from the drawers or the endorsers, the present plaintiffs, was complete; and the money having been rightfully received, could not be recovered back by the plaintiffs.

Judgment for the plaintiffs.

[* 449] *MUMFORD against THE PHENIX INSURANCE COMPANY.

A cargo was insured from New-York to Cherbourg, in France; and the policy contained a clause, "warranted free from seizure for or on account of any illicit or prohibited trade." The vessel met

THIS was an action on a policy of insurance, on goods on board of the ship *Victory*, from New-York to Cherbourg, in France.

The cause was tried at the New-York sittings, in June, 1810, when a verdict was found for the plaintiff, subject to the opinion of the court on the following case, with liberty to either party to turn the same into a special verdict. The policy contained the usual printed clause, "warranted free from seizure for or on account of any illicit or prohibited trade."

The *Victory* sailed from *New-York* the beginning of *August*, 1807, with a cargo on board. The goods insured consisted of 225 barrels of potashes, and 30 tons of fustic, which were admitted to be *American* property, belonging to the plaintiff, and of which he was the importer. On the 30th of *August*, 1807, while on her voyage, the *Victory* met with an *English* gun brig, which compelled her to go to *Plymouth*, her papers being taken by the master of the gun brig. She arrived in the outer road of *Plymouth* on the same day, and after being detained six hours, her papers were returned, and she was permitted to proceed on her voyage. During this detention, neither the master nor any of the crew went on shore, and the ship's papers were returned without any endorsement. The *Victory* arrived in the *Cherbourg* roads, on the 1st of *September*, 1807, and after the usual examinations of the officers of the customs and of the government, she was conducted by the pilot to the town of *Cherbourg*, where she arrived the 3d of *September*. The next day the master made a report of the ship and cargo, in the usual manner, but not receiving any permit to land the cargo, he remained, without breaking bulk, *until the 7th or 8th of *September*. On the 4th of *September*, the master and two seamen made a report and entry of the ship at the custom-house, and the following declaration, which was entered in the custom-house register: "That the *Victory* was carried by an *English* man of war brig into the outer road of *Plymouth*, where she anchored for the space of six hours, after which time she was permitted to prosecute her voyage." The master also made his protest, in which he stated that his ship was leaky, and requested that the cargo might be discharged, as he feared it was damaged. On the 7th of *September*, the consignees of the plaintiff (the ship and residue of the cargo being put under sequestration) made the requisite declarations, entries and bonds at the custom-house, for the purpose of landing the goods; but the custom-house officer refused a permit to land them, unless the consignees should give their obligation and declaration that the same should remain in sequestration, at the custom-house, which obligation and declaration was accordingly given, before obtaining any permit to land. After obtaining such permit, the *potashes* and *fustic* were landed, under the inspection of the custom-house officers, and placed in the warehouses designated by government, where they were kept under the keys of the custom-house, in the possession of its officers. The consignees had not the possession or disposal of the goods, at any time, nor any control over them; but from the time of their landing until

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with an *English* cruiser, and was compelled to go into the outer road of *Plymouth*, where she was detained six hours, and then suffered to proceed, but no person belonging to the vessel went on shore during the time of her detention. The vessel and cargo arrived at *Cherbourg*, and were there seized under the *Berlin* decree,

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and confiscated, on the alleged ground that the captain, on his examination by one of the officers of the port, had made a false declaration, that he had not been in *England*. It was held, that this was not a loss arising from any illicit or prohibited trade; but under the general peril of "arrests and detentions of princes;" and that the insurers were liable. (a)

(a) To constitute a breach of warranty "against seizure or detention on account of illicit or prohibited trade, there must be an illicit or prohibited trade in fact existing. A condemnation under pretext of such a trade is not enough. *Johuston v. Ludlow*, 2 Johns. C. 481. S. C. 1 *Caines*, C. E. xxix. *Graham v. Pennsylvania Ins. Co.* 2 Wash. C. C. R. 113. And see further as to this clause, *Church v. Hubbard*, 3 *Cranch*, 157. *Smith v. Delaware Ins. Co.* 3 Wash. C. C. R. 127. *Ocean Ins. Co. v. Francis*, 2 *Wendell*, 64. *Gracie v. New-York Ins. Co.* 13 Johns. R. 161.

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they were condemned and sold, they remained sequestered, and under the keys of the custom-house. The goods were not put under the custom-house keys by the consignees, for the purpose of enjoying the privilege of *entrepôt*, or any other facilities to the consignees; and the goods were free from duty, on importation into *France*. A guard was placed on the ship, on the 7th of *September*, before the goods were landed, and after certain examinations and proceedings, the ship and cargo were, on the next day, declared to *be liable to seizure, and ordered to remain under sequestration, until superior orders were received; and the necessary precautions were taken, on the part of the government, to secure the vessel and the cargo, including the goods insured, which were afterwards condemned by the *French* council of prizes.

The *procès verbal*, on which the decree of condemnation purported to be grounded, stated, that the director of the customs at *Cherbourg* having, on the 7th of *September*, 1807, received a letter from the *director-general* of the customs, dated the 4th of *September*, informing that the emperor had decided, that the 7th and 8th articles of the decree of the 21st of *November*, 1806, called the *Berlin* decree, should have a full and entire execution, and that no vessel which should have touched in *England*, or should have been carried thither, should be admitted; and that the said director of the customs, having received information from one of the chief officers of the customs, informing him that it appeared, by the declaration of the captain of the *Victory*, and two of the crew, made at the custom-house, that the ship had touched in *England*, the director went to the principal commissary of marine, and having learned that in contempt of the 3d, 7th and 8th articles of the said decree, which were made known to the captain, in his own language, by one of the officers of the frigate *Stationaire*, the captain had declared that he did not come direct from *England*, nor from the *English* colonies, and had not been there since the 21st *November*, 1806, directed a guard, on the 7th of *September*, to be placed on the *Victory*, which was accordingly done. That on the 8th of *September*, an examination was had on board of the *Victory*, by the proper officers of the government; and it was found by the ship's log-book, that she anchored in the outer road of *Plymouth*, on the 30th of *August*, 1807, where she was carried by an *English* brig; that the captain had been on shore, and that the ship had left the *road of *Plymouth* on the 31st of *August*, and pursued her destination to *Cherbourg*; that during the examination of the log-book, the captain of the *Victory* went on deck and took from his pocket-book a paper, which he tore in pieces; that the pieces being put together, the paper was found to be a certificate of the *American* consul at *Plymouth*, purporting that the ship had been carried by an *English* armed brig into that port, and released to continue her voyage; that the master, mate, and one

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of the mariners were interrogated anew, and made the declaration which they had made at the custom-house. That the master, being asked why he made a false declaration to the commandant of the frigate *Stationaire*, in affirming that he had not touched in *England*, he answered, that he did not understand the question. That on being asked why he privately tore the certificate of the *American* consul, he answered, that he was astonished at the questions put to him, and was afraid lest it might injure him; that he was then informed that the ship and cargo were subject to seizure, in conformity to the 7th and 8th articles of the decree of the 21st *November*, 1806, for the single fact of his false declaration; but as to the cargo, part of which was already discharged and under the control of the custom-house, things should remain in the state they were, until superior orders should be received; and necessary measures were taken, on the part of the government, to secure the ship and cargo.

The *procès verbal* was sent to the counsellor of state, and on the 20th of *September*, 1807, his letter was received, stating that there was a good cause of seizure of the ship and cargo, as *English* property, on the ground of a contravention of the 8th article of the *Berlin* decree.

The *procès verbal*, and other acts and documents, were transmitted to the council of prizes, who pronounced a decree, declaring the seizure of the ship and cargo, including *what was landed and under the custom-house keys, to be good and lawful, under the 8th article of the decree of the 21st *November*, 1806, and confiscating the ship and cargo for the benefit of the government, to be disposed of pursuant to that decree. The reasons set forth in the decree were, that the captain, on the 2d of *September*, 1807, affirmed, that he had not been in *England*, when, by his log-book and his own declaration, it appeared that he had been in *England*; that none of the excuses for the false declaration, offered by the captain, as that he was intoxicated at the time, or did not understand the language of the writing he signed, which was in *French* and *English*, could be admitted.

The captain of the *Victory* was examined as a witness at the trial. He testified that none of the crew left the *Victory* while in the road of *Plymouth*, that he was ordered on board of the *English* gun brig, but never went ashore, nor was any thing taken on board, except the certificate of the *American* consul. On his arrival at the *Cherbourg* roads, where he came to anchor, a boat from the custom-house, and one belonging to the police, came on board, by whom he was examined, and to whom he communicated fully the circumstance of his having been compelled to go into the road of *Plymouth*; that the officers of the boats examined the ship's papers and log-book. The pilot then directed him to go on board the frigate *Stationaire*, before he could go up to the town, and he accordingly

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went on board the frigate, where a conversation took place between him and the commander; but as he was ignorant of the *French* language, and there was no interpreter present, he understood very little of what was said. That he heard no question as to having been in *England*, or having been visited by the *British*; that he signed a paper written in the *French* language, on board of the frigate, which was not translated or explained to him; but was represented to be a paper which it was necessary for him to sign, *before the ship could be permitted to go up to the town; that the ship's papers and log-book were taken from him by the *French* officer, and were not returned to him again; that no paper or decree in *French* and *English* was shown to him, and that he signed no declaration nor made any acknowledgment that he had been on shore in *England*; that he did not tear the certificate of the *American* consul, but standing on deck, while the officers were examining the log-book, he had occasion to take some money out of his pocket, and took out, at the same time, the certificate, which he had carried in his pocket, as a paper of no importance, and which was much worn, and on being asked by the officer what it was, he said it was a paper of no consequence, but the officer appearing desirous to have it, he gave it to the broker; and that he made no such answers as are stated in the *procès verbal*.

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A deposition of a witness taken in *Cherbourg*, under a commission, was read in evidence, which stated that the captain of the *Victory* signed a paper on board of the *Stationnaire*, or guard-ship, in the road of *Cherbourg*, declaring that the *Victory* did not come directly from *England* or an *English* colony; that the paper was in the *French* language, and was signed by the captain without any previous interpretation; and the officer of the guard-ship observed, that it was a formality merely to announce the arrival of the *Victory*, and the nature of her cargo; that if the usual interrogatories had been put, and properly interpreted to the captain of the *Victory*, the witness believed the captain would have mentioned his having been compelled to go to *Plymouth*, and that on such information he would have been ordered, according to the instructions of the government, at that time, to return to sea; but that the *Victory*, not having been ordered to sea, in consequence of the misunderstanding which took place on board the *guard-ship*, and having once entered the port of *Cherbourg*, became liable to be confiscated, *under the decree of the 21st of *November*, 1806, and that no means used by the captain, consignee, or any person, could save her or her cargo; that the *potashes* and *fustic* were at no time at the disposal of the consignees, but the seizure was commenced before the landing of the goods, and never removed; the goods having been permitted to be landed only on giving security to the custom-house, to have them

forthcoming, or to pay the value thereof, and to submit to the decision of the government respecting them.

Soon after the sentence of condemnation, the *potashes* and *justic* were sold at public auction, under the direction of the officers of the government, and the proceeds thereof were received and kept by, the government or its agents.

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S. Jones, jun., for the plaintiff. The plaintiff, having proved his interest, that the property was *American*, and that it was seized before it was landed, and afterwards condemned, is, on general principles, entitled to recover. Is there any thing in the reasons assigned by the *French* court for the condemnation, which can defeat or prevent his recovery?

The consular certificate alleged to have been destroyed was a paper of no consequence. It is impossible that the captain would have intended any thing improper in regard to that paper, or have supposed that it could affect him. His account of it is natural, and undoubtedly true. He positively denies the entry in the log-book, as stated in the *procès verbal*; his papers having been taken from him and detained, he had no means of explanation, and we must rely on his deposition. Can it, for a moment, be believed, that the master could have understood the purport of the declaration signed by him, that he had not been in *England*? But admitting that he knowingly signed it, and that it was false, is it such a false declaration, as by the law of *nations* would be a cause of condemnation? If it is not a sufficient cause of condemnation, under the law of nations, neither can it be under the *Berlin* decree. It is not requisite to inquire whether this decree is a municipal regulation or not. Admitting that *France* had a right to prohibit neutral vessels which had touched in *England*, or been boarded by *English* cruisers, from entering her ports; yet she could have a right only to turn away such vessels from her ports, not to seize and condemn them for that cause. Such a seizure and condemnation would be a flagrant act of hostility. In *Mayne v. Walter*, (*Park*, 263. 474.) where a ship was warranted *Portuguese*, and was condemned by the *French* court because she had an *English* supercargo on board, Lord *Mansfield* said, it was an arbitrary, oppressive regulation, contrary to the law of nations, and the insured were entitled to recover. After being released by the *British* cruiser, the master could not avoid proceeding to his port of destination; for, according to the decision in *Craig v. The United Insurance Company*, (6 *Johns. Rep.* 226.) the fear of seizure under the *Berlin* decree would not have justified an abandonment of the voyage. Besides, the master had every reason to believe, from the declaration of the *American* minister at *Paris*, that the *Ierlin* decree would not be enforced against *American* vessels. The vessel was, in fact, permitted to enter *Cherbourg*. The subsequent seizure and condemnation was arbitrary and unjust, and with

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out any fault of the master. Again, if the master did knowingly make a *false* declaration, it was *barratry*; being a fraudulent act done to the injury of the owners. (2 *Stra.* 1173 6 *Term Rep.* 379. 8 *East*, 126. *Park*, 114. 124.)

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T. A. Emmet, contra. The point as to *barratry* must be dismissed; for there is no count in the declaration for *barratry*. The opinion of Lord *Ellenborough*, in *Earle v. Rowcroft*, subverts all distinction between *barratry* and the faults of the master. It is an essential ingredient *in an act of *barratry*, that it is done by the master for his own benefit. (*Park*, 111.)

[*Jones*. It was agreed by the attorneys, that any special counts which the plaintiff thought necessary, should be added to the declaration.]

The act of the master was either a violation of the law of nations, or of a municipal regulation of the government of *France*. This is not *barratry*. It does not appear that the conduct was *ex maleficio*, or for his own benefit.

I contend that the goods were *safely landed*, within the terms of the policy. The vessel arrived at her port of destination. The consignees came forward and petitioned to have the cargo landed; and it was landed in consequence of their request. Notwithstanding the provisional seizure, the goods were not, in fact, sequestered, until a fortnight after they had been landed at the request of the consignees. The words in the policy, "until the said goods shall be safely landed," could never be intended to apply to the goods, after they had once touched the land. Suppose they had been consumed by fire, six months after they had been put into the custom-house stores, would the insurers have been liable? Are they to continue answerable for an indefinite time? Is *sea* risk to be converted into *land* risk? The consignees having exercised acts of ownership, and procured the landing of the goods, the policy was at an end, and the defendants discharged.

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Again, here was a seizure and condemnation for an illicit and prohibited trade. It is true that the *Milan* and *Aranjuez* decrees were hostile and belligerent. But *France* did not commence her system by an open hostile act. The *Berlin* decree is not of that character. *The 7th article merely declares that "no vessel coming directly from *England* or her colonies, or having been there since the publication of the decree, should be admitted into any port." And the 8th article declares, "that every vessel that, by a false declaration, contravenes the 7th article, shall be seized, and the ship and cargo confiscated, as if *English* property." It is not liable to confiscation *as English* property, but as *if* it were *English* property.

It may be said, that as the *council of prizes* adjudicated upon this seizure, it was hostile; but as the decree gives jurisdiction

to that court, as if it were *English* property, they were bound to decide on the case. This decree is a mere municipal regulation. It does not affect the flag or neutrality of other nations. It does not extend to the high seas. It merely affects vessels coming into the ports of *France*. It is, therefore, a mere prohibition to trade, and is distinguishable from the *Milan* and *Aranjuez* decrees. The sentence of the court declares the seizure good and lawful under the decree, but does not contain the word *prize*, or any language indicating a hostile seizure. The case of *Johnston & Weir v. Ludlow* (2 *Johns. Cas.* 481.) will, probably, be cited to show that to constitute a breach of the warranty, there must be an illicit and prohibited trade, in fact; and that it is not sufficient to show a condemnation, under pretext of an illicit trade. I admit that this decision is confirmed by the case of *Graham v. The Pennsylvania Insurance Company*, in the Circuit Court of the *United States* for the district of *Pennsylvania*. (*Condy's* ed. of *Marshall*, 345. a. 347. in note.) But the words, "for or on account of," must mean something more than a seizure for an illicit trade, in fact. From the evidence in the case, it must be taken as a fact, that the captain did make a false declaration, in consequence of which the trading at *Cherbourg* became illicit. The fact having happened, by which the trade under the *Berlin* decree became illicit, and so declared by the council of prizes, *will this court say there was no illicit trade? The facts, according to the *procès verbal*, were proved by four witnesses; and are they now to be contradicted or explained by the testimony of the captain? If, then, this was a prohibited trade, and the seizure was for that cause, the defendants are discharged.

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Hoffman, in reply. The goods were never safely landed. When the captain went to the custom-house to make his entry, he declared truly that he had been carried into *Plymouth*; and in consequence of this declaration, there was a *provisional seizure* of the vessel and cargo. The case states, that at no time were the goods under the dominion of the consignees.

Whether the captain did make a false declaration, or not, is open to examination here; and the fact is positively denied by him. His deposition fully explains the transaction, and shows, most satisfactorily, that he never made such a declaration. But even admitting that he did make a false declaration on board of the guard-ship, he did not falsify the warranty of neutrality, nor the warranty as to illicit or prohibited trade. The provisional seizure was not made on account of his false declaration at the mouth of the river, but on account of his true declaration at the custom-house. Before the 4th *September*, the *Berlin* decree had never been enforced against the *Americans*. This ship was the first victim.

But it is said that the *Berlin* decree is a mere municipal regulation. The *preamble* shows its true character. It is hos-

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tile to *Great Britain*, and to the gratification of that hostility, it sacrifices all neutral rights. There is no distinction between this and the *Milan* decree. Both are dictated by the same spirit, and form part of the same system. The principles of both are the same. The latter is only more explicit and extensive than the *former. A condemnation as if it were *English* property is the same as a condemnation as enemy's property. The case of *Craig v. The United Insurance Company* admits that a seizure under the *Milan* decree would be within the policy. It is for the court to decide whether the *Berlin* decree does not violate neutral rights. If it does, it ceases to be a mere municipal regulation. The question is substantially decided in the case of *Speyer v. The New-York Insurance Company*. (3 *Johns. Rep.* 88.)

But if the *Berlin* decree was a mere municipal regulation, the act of the master must be *barratry*. For it is settled, that if the master knowingly violates the laws of the country to which the vessel is destined, in consequence of which she is seized, it is an act of *barratry*.

KENT, Ch. J. That question was discussed in the case of *Strickley v. Delafield*, (2 *Caines*, 223. and see *Kendrick v. Delafield*, 2 *Caines*, 67.)

Per Curiam. The seizure in this case was not on account of the fact of the ship having come from *England*. That fact would only have caused the vessel to be sent away. She was seized and condemned with her cargo, on the single ground of a false declaration of the captain, made on board the *Stationaire*, that he had not been to *England*. This appears from the proceedings in the *French* admiralty, and it was, therefore, not a loss "for or on account of any illicit or prohibited trade." The avowed cause of the seizure and loss, being a fraud in the master, distinguishes this case from that of *Speyer v. New-York Insurance Company*, (3 *Johns. Rep.* 88.) to which it would otherwise have been very analogous. The ground of condemnation was proved, upon the trial of this cause, to be untrue and unjust, and it was a charge exceedingly improbable in itself, considering the circumstances at the time. But we have *nothing to do here with the pretexts for the condemnation, so long as the loss was not for any illicit or prohibited trade. The loss came under the general peril of "arrests and detention of princes." Going to *Cherbourg*, after having touched at *Plymouth*, was going to a prohibited port, under the 7th article of the *Berlin* decree; but the mere entry into that port was not a breach of warranty. If there had been no seizure, and the ship had taken fire and been burnt in the harbor, before the goods were landed, the insurer would undoubtedly have been liable. Seizure for trading or attempting to trade at *Cherbourg*, contrary to the *Berlin* decree, would have brought

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the case within the reach of the warranty. The seizure and condemnation, in this case, were not made upon that ground, but on the ground of an alleged imposition by the captain; and if it be established by the case that the loss did not arise from seizure for a prohibited trade, but from seizure for another cause, the insurer is responsible for the loss.

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THOMAS
v.
ROOSA.

Judgment for the plaintiff.

THOMAS against ROOSA.

THIS was an action of *assumpsit*. The declaration contained two counts on two several promissory notes. The second count was on a note by which the defendant promised to pay the plaintiff "in a good horse, to be worth, with saddle and bridle, eighty dollars, and goods out of the store amounting to twenty dollars," &c., by *reason whereof, and by force of the statute in such case made and provided, "the defendant became liable to pay," &c., and being so liable, &c., undertook, &c.; yet the defendant, not regarding, &c., "hath not paid the said several sums of money in the said notes mentioned, nor any part thereof," &c.

At the trial of the cause, at the circuit in *Sullivan* county, in *September*, 1810, a general verdict was taken for the plaintiff for the sums due on both notes.

Caince, for the defendant, moved in arrest of judgment, 1. Because the note in the second count was declared on under the statute; and, 2. Because the breach was ill assigned. He cited 1 *Saund.* 32. 2 *Saund.* 181. b. 1 *Saund.* 228. *Com. Dig. Plead.* C. 45. 49.

- *Fisk*, contra.

Per Curiam. The note in the second count was payable in chattels, and so was not a promissory note under the statute, but the reference to the statute may be rejected as surplusage, and is good after verdict. Nor was any request requisite to be specially averred and proved, for a request was not parcel of the contract. The contract is sufficiently set forth, and was a valid one. Any defect or inaccuracy in assigning the breach is aided after verdict, for the court will intend that damages could not have been given, if a good breach had not been shown. (2 *Jones*, 125. *Anon. Skinner*, 344. *Knight v. Keech*.) There is no ground for the motion in arrest of judgment, and it must be denied.

Where a promissory note, payable in *chattels*, was declared upon as under the statute; and the breach [*462] assigned was, that the defendant did not pay the money mentioned in the note &c., it was held, after verdict, that the reference to the statute might be rejected as surplusage, and the defect in assigning the breach was aided by the verdict, so that the court would intend that a sufficient breach was proved.

Motion denied.

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SLINGER-
LAND

v.
MORSE and
others.

Where a landlord distrained the goods of his tenant for rent in arrear, and A. signed an agreement on the back of the inventory, by which he "promised to deliver all the goods contained in the inventory, to the landlord, in six days after demand, or pay him 450 dollars, being the amount of the rent due; it was held, that 'his was an original and not a collateral undertaking, and an action might be maintained against A. for a breach of the promise. (a)

*SLINGERLAND *against* MORSE and others.

THIS was an action of *assumpsit*. The declaration stated that the defendants, on the 7th June, 1809, in consideration that the plaintiff had delivered to the defendants two horses, eight beds, two cows, &c., the defendants undertook, and by their agreement in writing promised the plaintiff to deliver the same articles to the plaintiff when he should demand the same, or pay the plaintiff 450 dollars. The plaintiff averred that he demanded the goods of the defendants on the 1st of August, 1809, and the defendants have not delivered them, &c., or paid the 450 dollars, but have refused, &c. The defendants pleaded *non assumpsit*, with notice of special matter to be given in evidence.

The cause was tried at the *Saratoga* circuit, the 29th May, 1810, before Mr. Justice *Van Ness*. The plaintiff proved that one *Buys* was duly authorized by the plaintiff to distrain for rent due to the plaintiff from his tenant, to the amount of 450 dollars, and that the articles mentioned in the declaration were duly distrained, of which notice was given to the tenant, accompanied with an inventory of the articles distrained; but the goods were not removed. The defendants, at the request of the tenant, signed an agreement, endorsed on the back of an inventory of the goods, as follows: "We do hereby promise to deliver to *Peter Slingerland* all the goods and chattels contained in the within inventory, in six days after demand, or pay the said *Peter* 450 dollars. June 7, 1809." *Buys* thereupon suspended the sale of the goods, and left them in the house of the tenant. The counsel for the plaintiff then offered to prove a demand of the goods, &c., and a refusal, prior to the commencement of the suit. But it was objected that the agreement was a mere collateral undertaking, and as no *consideration was expressed or appeared on the face of the writing, it was void.

The judge being of opinion that it was a collateral undertaking, and that as no consideration appeared on the face of

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(a) Vid. 2 R. S. 135. sec. 2. The cases arising under this branch of the statute of frauds have been distinguished into three classes: 1. Where the promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor. 2. Where the collateral undertaking is subsequent to the creation of the debt, and was not the inducement to it, though the substantiating liability is the ground of the promise, without any distinct inducement. 3. Where the promise arises out of some new and original consideration of benefit or harm moving between the newly contracting parties. The two first cases are within the statute, but the last is not. Per *Kent*, Ch. J., delivering the opinion of the court in *Leonard v. Vredenberg*, 8 Johns. R. 23. These distinctions will be found to control the subsequent cases, the decisions in most of which have been expressly founded upon that of *Leonard v. Vredenberg*. Vid. *Skellon v. Brewster*, 8 Johns. R. 376. *Harrison v. Sawtel*, 10 Johns. R. 242. *Gold v. Phillips*, Id. 412. *Bailey v. Freeman*, 11 Johns. R. 221. *Nelson v. Dubois*, 13 Johns. R. 175. *Myers v. Morse*, 15 Johns. R. 425. *Chase v. Day*, 17 Johns. R. 114. *Olmstead v. Greenby*, 18 Johns. R. 12. *Farley v. Cleveland*, 4 Cowen, 432. S. C. 9 Cowen, 639. *Gallagher v. Brunel*, 6 Cowen, 346. *Chapin v. Merrill*, 4 Wendell, 687. *Gardiner v. Hopkins*, 5 Wendell, 23. *Elwood v. Mont*, Id. 235. *King v. Despard*, Id. 271.

the paper, no action could be maintained; and he rejected the evidence offered; and the plaintiff was nonsuited. A bill of exceptions was tendered to the opinion of the judge, and signed by him, pursuant to the act.

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CLARK.

Rodman, for the plaintiff, moved to set aside the nonsuit, and for a new trial. He cited 1 *Saund.* 211. note 2. 3 *Johns. Rep.* 210. 4 *Johns. Rep.* 280. 1 *Comyn on Contracts*, 104.

Foot, contra

Per Curiam. This was an original and not a collateral undertaking. The case of *William v. Leper* (3 *Burr.* 1886.) is very much in point. Here the plaintiff, as landlord, had a legal pledge in his custody, and the defendants made the promise in order to discharge the goods of the distress. According to the expression of Mr. Justice *Aston*, the goods here were the debtor. Whether this promise would not be good, even as a collateral undertaking, is another question. Lord *Eldon* says (14 *Vesey*, 190.) that in cases of a collateral undertaking to pay the debt of another, there is *no new* consideration moving from the party making the promise to the party to whom it is made; and the same idea is advanced by the counsel for the plaintiff in the case cited from *Burrow*. But on this point we give no opinion. In the case of *Sears v. Brink & Brink*, (3 *Johns. Rep.* 210.) there was a consideration admitted, and the court say that the consideration was part of the agreement, and ought to have been in writing; but the question did not arise as to what would have been the effect of the writing, if it had not been *averred* and admitted that there was a consideration constituting a part of the agreement.

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The motion to set aside the nonsuit is granted, with costs to abide the event of the suit.

Motion granted.

M'NITT *against* CLARK.

THIS was an action of debt on a bond, dated *June 26*, 1807, for 1,200 dollars. The condition was, if the defendant should pay to the plaintiff 600 dollars in one year from the date, or 400 dollars in 6 months from the date, then the method of separating, collecting and preparing the sulphate of ashes into *sal. polychrist.* or *turt. vitriol.* was to belong to the defendant,

Where, by the condition of a bond, the obligor had an election to pay 600 dollars for a patent right, at the end of twelve months, or to account to

the obligee for the profits, &c., and the obligor sold the right to a third person, and made no election within twelve months; it was held, that the obligor having failed to make his election or to perform any part of the condition of the bond, within the time specified, he had lost his election, and the obligee might elect which he would demand, and hold the obligor for the payment of the 600 dollars.

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and the whole right of vending the same in the county of *Che-nango*, and nowhere else, or otherwise the defendant was to return two thirds of the profits arising from the sales of such patent right, at the end of every six months; and at the end of six months, the defendant was to have his choice, either to pay the 400 dollars, or return two thirds of the profits, or to pay the 600 dollars at the end of one year, or return two thirds of the profits at that time; and the defendant was to prosecute such as should violate the patent right granted to the plaintiff, at his expense.

This suit was commenced in *November* term, 1808. The breach assigned in the declaration was, that the defendant did not pay to the plaintiff the sum of 400 dollars at the end of six months, nor return two thirds of the profits, &c. at the end of every six months, nor has he paid to, the plaintiff 600 dollars at the end of one year from the date of the said bond, &c.

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*The cause was tried at the *Oneida* circuit, in *June*, 1810, before Mr. Justice *Spencer*.

The plaintiff having proved the execution of the bond, insisted that the defendant, not having elected to account and return the profits, &c., within the time mentioned in the condition, was precluded from availing himself of such an election and defence, by accounting for the profits; but the judge was of opinion that the defendant might avail himself of a defence upon the third alternative of accounting, without showing any previous election; and that the plaintiff must prove the profits received by the defendant, in order to recover more than nominal damages.

The plaintiff proved that the defendant had sold the patent right he had purchased of the plaintiff, to one *Burritt*, on the 26th of *September*, 1807, and insisted that the defendant had thereby lost the benefit of electing to account for the profits, and was bound to pay one of the specific sums mentioned in the condition of his bond. But the judge charged the jury that the plaintiff was entitled to recover nominal damages only, and a verdict was found accordingly.

A motion was made to set aside the verdict, and for a new trial.

Gold, for the plaintiff. He cited 5 *Viner*, 210. *Condition*, § 13. pl. 4. *Y.* pl. 13. p. 217. pl. 15. *Cro. Eliz.* 864. *Cro Jac.* 594.

Sedgwick, contra. He cited *Com. Dig. Condition*, K. 1. 1 *Roll. Abr.* 446. l. 20. *Powell on Contracts*, 397. 399. *Bac. Abr. Condition*, P.

Per Curiam. The defendant showed nothing in his defence, and he is, therefore, to be considered as having failed in every part of the condition of the bond, and to have performed neither

alternative. He had his election *to pay the 400 dollars at the end of six months, or account; or to pay the 600 dollars at the end of one year, or account for the profits; but having totally failed, he has lost his election, and the plaintiff may now elect for himself. This is a settled principle. The case of 13 *Edw. IV.* pl. 12. and which is abridged in *Bro. (Dette, pl. 159.)* established this rule. That was debt upon an obligation to pay 20*l.* or 20 bales of wool, and the plaintiff demanded the 20*l.* *Pigot, J., and Brian, J.,* held, that before the day of payment, the obligor had his election to tender which of them he would, but that after the day of payment, and no tender made, the obligee had his election to demand which he would. But *Brian, J.,* admitted, that if a man be bound to pay 20*l.* at *Easter*, or 10*l.* at *Michaelmas*, here, although he paid not at the first day, he can pay at the second day. In *Dyer, 18. a. Baldwin, J., and Englefield, J.,* recognized the same doctrine; and the cases cited from *Cro. Eliz.* and *Cro. Jac.* are to the same effect.

The sale which the defendant made of his right, under the contract in *September, 1807*, precluded him from the ability to account, as agent or factor, for the proceeds, and he is now bound to pay the 600 dollars.

The motion, therefore, on the part of the plaintiff, for a new trial, must be granted, with costs to abide the event of the suit.

New trial granted

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*PEASE and another against MORGAN.

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THIS cause came before the court on a writ of error from the Court of Common Pleas of *Oneida* county. *Morgan* declared, in the court below, against *John B. Pease*, and *George Pease*, for that whereas the said *John B.* and *George*, on the 20th of *May, 1799*, at, &c., made their note in writing, commonly called a promissory note, their own proper hands and names being thereunto subscribed, by the name and description of *John and George Pease*, bearing date, &c., and then

In an action against two or more persons, on a promissory note, with a joint name or firm, if the declaration contains no averment that the defendants were partners, or acted under the

firm, but that the defendants "made the note in their own proper hands and names thereunto subscribed," proof that one of the defendants subscribed the note with the joint name or firm, is not sufficient to prove the contract as laid. (a)

But on error from the Court of Common Pleas, this court allowed the defendant in error to amend his declaration, on payment of costs in the court below, subsequent to the declaration; and the plaintiff in error was allowed 20 days after service of such amended declaration to pay the amount recovered below, without costs, or to plead; and if he pleaded, a *venire de novo* was ordered, returnable at the next circuit. Where judgment is given for the plaintiff in the court below, and that judgment is reversed, the plaintiff in error recovers no costs. (b)

(a) But a promissory note made by one of two partners in the name of the firm, it seems, is admissible in evidence in an action against both partners under a count on the note, although there is no averment of partnership in the declaration. *Nack v. Spencer, 4 Wendell, 411.* It is undoubtedly admissible under the usual counts. *Id.*

(b) But costs are now recoverable on reversal. 2 R. 5. 618. a. 31

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and there delivered the said note to *Samuel Milliman* and *Zerah Smith*, and thereby, for value received, promised the said *Samuel* and *Zerah*, by the name and description of *Milliman & Smith*, to pay to them or order, 34 dollars and 50 cents, on demand, with interest, &c.

The declaration then stated the endorsement from *Milliman & Smith* to the plaintiff; and that the defendants below became liable, &c., and being so liable, &c., undertook and promised to pay, &c.

Plea, *non assumpsit*.

At the trial in the court below, the subscribing witness to the note was called to prove its execution. He testified that he subscribed his name as a witness; that one of the defendants signed the note, and he was of opinion that the signature was in the hand-writing of *George Pease*.

To prove the endorsement, one witness stated that he thought it the hand-writing of *Milliman*, but had never seen him write but once; and another witness said it more resembled the hand-writing of *Smith*, but that his recollection as to the hand-writing was imperfect.

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*The defendants objected to the reading of the note in evidence; but the court overruled the objection, and a verdict was found for the plaintiff.

The errors assigned were, 1. That there was a variance between the count and the note, both as to the making and subscription.

2. It was not proved that the makers of the note, or the endorsers, were partners, or that one had authority to sign for the other. It was only proved that *George*, one of the defendants, signed the note. The proof did not, therefore, support the declaration.

3. The proof of the hand-writing of the makers and endorsers was not sufficient.

The cause was submitted to the court without argument.

Per Curiam. There was no averment in the declaration that the defendants were partners, or acted under the firm of *John & George Pease*, but the declaration is, that the defendants made the note, "their own proper hands and names being thereunto subscribed," and the proof was, that only the defendant *George* signed the note. This was not sufficient to prove the contract as laid. There is no case or precedent to warrant such proof applied to such a declaration.

In *The Manhattan Company v. Ledyard & Ledyard* (1 *Carnes's Rep.* 192.) there were the proper averments; and that case only decides, that it was sufficient to state that the firm subscribed the note, without saying that one of the firm did it in the name of the firm.

The exception to the testimony being properly taken, the judgment below must be reversed, unless the defendant in
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error chooses to avail himself of the terms on which this court is willing to relieve him, upon his prayer for leave to amend. On the payment of the costs of the court below, subsequent to the filing of the declaration, *the defendant has leave to amend his declaration, by inserting the requisite averments, and the plaintiff in error has 20 days from the service of the amended declaration to pay the amount of the note, as recovered in the court below, without costs, or to plead; and in the last case, a *venire de novo* is awarded, returnable at the *Oneida* circuit. The authorities for this proceeding are *Brown v. Clark*, (3 *Johns. Rep.* 443.) and the cases there referred to; *Dumond v. Carpenter*, (2 *Johns. Rep.* 184.) *Vicar v. Hayden*, (*Cowp.* 841.) and *Rex v. Ponsonby*, (1 *Wils.* 303.) This is done without costs in error, because, if judgment be given for the plaintiff below, and that judgment be reversed, the plaintiff in error recovers no costs, as the case is not within any of the provisions of the act giving costs. (*Ball v. Potts*, 5 *East*, 49.) The allowance of the amendment in this case may be going further than the precedents; but not further than the reason and principle on which they are founded. "The superior court where error is brought, may," says Ch. J. *Lee*, "make such amendments as the court below may, when the superior court has the same matter to amend by as the inferior has." Here we have the whole record, and such an amendment in a declaration would be almost a matter of course in the same court.

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v.
LOVE.
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TUTTLE against LOVE.

THIS was an action of *assumpsit*. The declaration contained four counts. The fourth count was on a special undertaking of the defendant, and stated that the defendant being a deputy of the sheriff of *Madison* county, and in the practice of receiving executions, and *collecting the money thereon, without any particular direction or control of the sheriff, on the 1st of *December*, 1809, an execution on a judgment in favor of the plaintiff against one *Morris*, for 200 dollars, was delivered to the defendant, as deputy sheriff, at his special instance and request, and that he afterwards collected and received the money, and was requested to pay it to the plaintiff; whereby

Assumpsit lies against a deputy sheriff, upon an express promise to pay money collect-

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ed by him on an execution, to the plaintiff.

But the plaintiff must prove a clear and absolute promise. It is not sufficient that the deputy sheriff

said that "he would pay the amount of the judgment, but not the costs of entering a rule for an attachment," when the plaintiff would not accept the one without the other. (a)

If one party does not accede to a promise, as made, the other party is not bound by it.

(a) The action, when there is no express promise by the deputy, should be brought against the sheriff, who is liable for all acts of the deputy, performed *colore officii*. Vid. *supra*, 35 *McIntyre v. Trumbull*, note a. In general, an action will not lie against an under sheriff for a breach of duty in his office. *Paddock v. Cameron*, 8 *Cowen*, 212.

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the defendant became liable to pay, &c., and being so liable he undertook and promised to pay, &c. Plea, *non assumpsit*.

The cause was tried at the *Madison* circuit, in *May*, 1810, before the *chief justice*.

At the trial it was admitted, that the defendant, as deputy sheriff, received of the plaintiff an execution in his favor against *Morris*, for 53 dollars and 5 cents. It was proved, that in *January*, 1810, the defendant said he had not then collected the money on the execution, but expected soon to receive it, and promised to send it to the plaintiff as soon as it was collected; that afterwards, about the 1st of *February*, the defendant received the money of *Morris*; and the clerk of the plaintiff's attorney called on the defendant, and exhibited a bill of the costs of entering a rule for an attachment against the sheriff, but the writ had not been taken out; and the defendant offered to pay the amount of the judgment, but refused to pay the costs of the rule. The clerk declined receiving the money, unless the costs were also paid; and the defendant said he would call and see the plaintiff's attorney in a few days.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts.

A motion was also made in arrest of judgment, on the ground that *assumpsit* will not lie against a *deputy sheriff*, on a special promise to pay money collected on an execution.

*The cause was submitted to the court without argument.

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Per Curiam. Two motions were submitted to the court upon this case; the one in arrest of judgment, and the other for judgment for the defendant, upon the facts stated in the case.

1. The fourth count is upon a special contract made by the defendant, promising to pay the money which he had collected for the plaintiff, upon request, and after he had received the money. Such an express promise, founded upon the receipt of the money, may be good. A deputy sheriff, as well as any other agent, may make himself personally responsible by a special undertaking. The general rule is laid down in *Cameron v. Reynolds*, (*Corp.* 403.) that an action will not lie against an under sheriff for a breach of duty in his office. It is the special promise founded upon the collection of the money, that is the ground of this action, and on that ground it may be sustained. But,

2. The evidence did not support the count. There ought to be a clear, absolute promise made out. Here, the only evidence of the undertaking was, that the defendant said "he would pay the amount of the judgment, but would not pay the costs of the rule," and the agent of the plaintiff would not accept of the one without the other. The promise, upon the terms offered, not being accepted, ceased to operate. If one party does not accede to the promise, the other party is not

bound. (a) What the defendant afterwards said, "that he would come and see Mr. *Randall* (the attorney for the plaintiff) in a few days," amounted to nothing. And as the verdict was taken subject to the opinion of the court, there must be judgment for the defendant.

Judgment for the defendant.

(a) Vid. *Tucker v. Woods*, 12 *Johns. Rep.* 190. *Eliason v. Henshaw*, 4 *Wheat.* 225. *Mactier v. Frith*, 6 *Wendell*, 103.

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*D. MERRITT against JOHNSON.

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THIS was an action of *trover*. At the trial, the following facts were proved:—

On the 24th September, 1805, *Joseph Travis* and *Ebenezer Merritt* entered into an agreement, by which *Travis*, who is a shipwright, in consideration of 1,300 dollars, agreed to build a sloop for him, of certain dimensions, expressed in the agreement. *Travis* engaged to furnish the timber requisite to complete the frame of the vessel, at the ship-yard. The joiner's work was to be done at the expense of *Ebenezer Merritt*. The vessel was to be completed and launched on or before the 4th July, 1806. *Ebenezer Merritt* engaged to pay *Travis* one third of the sum of 1,300 dollars as soon as one third of the work was done, one third of the same sum as soon as two thirds of the work was done, and the other third of the said sum when the whole of the work was completed, if, in the opinion of *A.* and *B.*, the sloop was well built, &c.; and if they decided she was well built, &c., then *Ebenezer Merritt* was to pay a further sum of 50 dollars, otherwise such sum was not to be paid, and *Travis* was to pay all damages arising from a breach of his agreement, &c.

In pursuance of this agreement, *Ebenezer Merritt* furnished various materials for the vessel, and advanced money to *Travis* with which to purchase other materials. On the 1st of May, 1806, *Ebenezer Merritt* assigned the contract with *Travis*, and his interest in the vessel, then unfinished, to the plaintiff, who continued to furnish materials, and advance money to *Travis* on the contract, until about one third of the vessel was finished, being planked up to the wales, and the whole expenditure amounted to about 1,030 dollars; *Travis* having furnished such materials as he was bound by the contract to supply up to that period. At this time, a *feri facias* was *issued out of this court on a judgment against *Travis*, on which the sheriff seized and sold the vessel, in her unfinished state, as the prop-

Where *A.* contracted with *B.* to build a vessel, and *A.* was to furnish the timber requisite to complete the frame of the vessel, and *B.* was to advance money to *A.* and also to furnish the materials for the joiner's work; and the vessel, while standing on land hired by *A.*, and in an unfinished state, was seized under a *feri facias* issued against *A.*, and sold by the sheriff to *C.*, who afterwards completed the vessel and sold her to *D.* In an action of *trover*, brought by *A.* against *D.*, it was held, that the property in the vessel was in *D.* and that *B.* could not have any property in the vessel, under the contract, until she was completed and delivered to him.

When the materials of *John* are united with the materials of *Richard*, by the

labor of *Richard*, who furnishes the principal materials, and those of *John* are only accessory, the right of property in the whole belongs to *Richard* by right of accession.

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erty of *Travis*. The plaintiff named in the execution purchased the vessel at the sheriff's sale, and afterwards sold her for 200 dollars, to the defendant in this suit, who was acquainted with all the facts, and was told by the vendor that he would not warrant the title, unless he received a full price, which the defendant refused to pay.

In *August*, 1808, the plaintiff made a formal demand of the vessel of the defendant, who refused to deliver her; but afterwards completed and sold her. At the time of the sheriff's sale, nothing was due from the plaintiff to *Travis*, on the contract. The vessel was built upon ground belonging to third persons, which *Travis* hired, with a house and the privilege of building vessels on the ground, at the rent of 35 dollars *per annum*.

A verdict was taken for the plaintiff, subject to the opinion of the court, on a case containing the above facts, and which was submitted to the court without argument.

Per Curiam. The plaintiff has not shown a right of property in the sloop so as to entitle him to an action of trover. The sloop was built by *Travis*, not on the ground of the plaintiff, or of *Ebenezer Merritt*, from whom he purchased his present right of action. It was built on ground belonging to third persons, and hired by *Travis* for this purpose. The principal part of the materials for the sloop, such as the timber for the frame, was furnished by *Travis*, and the sloop was one third finished and planked up to the wales, when she was seized and sold by the sheriff as the property of *Travis*, and under that sale the defendant holds the possession. The plaintiff's right rested entirely on the contract with *Travis*; and the sloop did not become his property until finished *and delivered. The ground on which the frame of the sloop stood, did, for that occasion, belong to *Travis*; and as he furnished all the timber for the frame, he certainly contributed the principal part of the materials. There is, then, no just pretence for considering the property of the unfinished sloop as vested in *Merritt*. When the materials of another are united to materials of mine, by my labor, or by the labor of another, and mine are the principal materials, and those of the other only accessory, I acquire the right of property in the whole, by right of accession. This is considered as a general principle in the acquisition of property. It is so laid down by *Bracton*, (*de acquir. rerum dom.* c. 2. s. 3, 4.) and *Pothier* illustrates it by a variety of clear and apposite examples. (*Traité du droit de Propriété*, No. 169. 180.) *Molloy* (b. 2. c. 1. s. 7.) applies a similar principle to the very case of building a vessel, and he refers to the *Pandects*, (Dig. 6. l. 61.) where it is admitted that if one repairs his vessel with another's materials, the property of the vessel remains in him; but if he builds a vessel from the foundation with the materials of another, the vessel belongs to the

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owner of the materials. *Gothofredus*, in his notes upon this passage, says, that if one builds a ship with his own and another's materials, the ship is his property, unless the keel was furnished by the other, and then the property would follow the keel, which he considers *instar soli et fundi*. But without pursuing these distinctions further, it is sufficient to observe, that upon the principles acknowledged by all the writers, the property of the vessel in question was in *Travis* when she was sold under the execution against him, and judgment must, accordingly, be rendered for the defendant.

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WARREN
v.
MAINS.

Judgment for the defendant.

***WARREN against MAINS.**

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THIS was an action of *covenant*. The cause was tried at the *Washington* circuit, in *June*, 1810, before Mr. Justice *Van Ness*. An agreement was proved, by which the plaintiff covenanted to pay to the defendant 300 dollars, on or before the 1st of *July*, 1809, at which time the defendant covenanted to convey to the plaintiff a certain farm, &c. Four days before the 1st of *July*, 1809, it was agreed between the parties that the 300 dollars should be paid in bank bills. On the 1st of *July*, the plaintiff tendered the 300 dollars in bank bills, which the defendant refused to receive, because they were not a legal tender; and no other money being offered, the defendant refused to execute the deed for the farm. The plaintiff, in his declaration against the defendant for a breach of the covenant, averred a tender according to the tenor and effect of the covenant, and the defendant pleaded the general issue. At the trial, the defendant objected to any evidence of an agreement to receive bank bills, and the judge overruled the objection; and a verdict was found for the plaintiff, for 250 dollars.

Where *A.* covenanted to pay *B.* 300 dollars on a certain day, on which *B.* covenanted to convey a farm to *A.*, and before the day, *B.* agreed to receive the 300 dollars in bank bills, which *A.* tendered at the day; but *B.* refused to receive them; it was held, in an action of covenant against *B.*, that the agreement to receive bank bills was a waiver of a tender in gold or silver, and was competent evidence at the trial, to support the tender at the day.

A motion was now made to set aside the verdict, and for a new trial.

Skinner, for the defendant. He cited 3 *Johns. Rep.* 528. 3 *Term Rep.* 590.

Z. R. Shepherd, contra.

Per Curiam. It was competent to the plaintiff to show, that before the day of payment, the defendant had agreed to accept bank bills, as cash, and had dispensed with the necessity of a tender in gold and silver. The *tender in bank bills was, consequently, good at the day, by reason of the previous waiver. The motion to set aside the verdict must be denied.

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Motion denied

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V.
VAN KLEECK.

DASH against VAN KLEECK, late Sheriff of ALBANY.

Where, after an escape of a prisoner on execution, and return into custody, the sheriff went out of office, and assigned the prisoner to his successor, and while in his custody, the prisoner applied to the court for his discharge, under the act for the relief of debtors, &c., and the plaintiff, not knowing of the escape, opposed the application, in consequence of which the prisoner remained in custody; it was

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held, that this was not such an election to affirm the debtor in custody as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape.

The act of the 28th of April, 1810, (33d sess. c. 187.) is no bar to an action brought against a sheriff, prior to the passing of that act, for the previous escape of a prisoner in his custody, and who had been admitted to the gaol liberties, on giving bonds pursuant to the act of the 30th of March, 1801. (24th sess. c. 91. s. 6.) (a)

An act of the legislature is not to be construed to operate retrospectively, so as to take away a vested right. (b)

It is a principle of universal jurisprudence, that laws, civil or criminal, must be prospective, and cannot have a retroactive effect.

(a) Vid. *Ballou v. Kip*, *supra*, 175. note a.

(b) Acc. *People v. Tibbitts*, 4 Cowen, 384. But this principle does not apply to a statute which merely alters or modifies a remedy. *Id.*

(c) 2 R. S. 433. sec. 40.

THIS was an action of debt for an escape. The cause was tried at the Albany circuit, in April, 1810, before Mr. Justice Thompson.

The declaration contained two counts. 1. For suffering and permitting *Jason Rudes*, being in the defendant's custody, as sheriff of the county of Albany, on a *ca. sa.* at the suit of the plaintiff, to go at large out of his custody, &c. 2. For that the defendant, having the said *Jason Rudes* in his custody, on such *ca. sa.* in pursuance of the statute in such case made and provided, permitted the said *Jason Rudes* to go at large within the limits of the liberties of the gaol of the city and county of Albany, and him then and there kept and detained, until the said *Jason Rudes*, afterwards, and while the defendant was sheriff, &c., without the leave or license, and against the will of the plaintiff, escaped and went at large without the said limits, &c., from and out of the custody, &c., contrary to the form of the statute in such case made and provided, whereby an action hath accrued, &c.

The defendant pleaded *nil debet*, with notice, that the escape of the prisoner out of the custody of the defendant, as mentioned in the plaintiff's declaration, if there was any such escape, was wrongfully, privily, and without the knowledge, permission or consent of the defendant; and that the said *Jason Rudes*, afterwards, and before the exhibiting the bill of the plaintiff, &c., voluntarily, and of his own accord, returned back again into the custody of the defendant, and there remained until after the commencement of this suit. The plea was accompanied by an affidavit that the escape was involuntary.

It was admitted, at the trial, that *Rudes* was in the custody of the defendant, as sheriff, on the *ca. sa.*, and was admitted to the liberties of the gaol, on giving bail according to the statute. (c) It was proved, that on the 18th of May, 1807, *Rudes* went into the northern part of the city of Albany, and without the limits of the gaol-liberties, and returned immediately thereafter, and before the commencement of this suit.

The defendant offered to prove that *Rudes*, immediately after the escape, returned, and remained within the liberties of the gaol until the defendant was removed from office, and an

other appointed in his stead, to whom the prisoner was duly assigned and delivered in custody, on the execution. That *Rudes*, being in custody of such sheriff, in pursuance of the "act for the relief of debtors, with respect to the imprisonment of their persons," in *August* term, 1808, and before the commencement of this suit, applied to the Supreme Court for relief, and that his application for a discharge was opposed by the counsel for the plaintiff, in consequence of which opposition *Rudes* was detained in the custody of the sheriff. This evidence was objected to by the plaintiff's counsel, and overruled by the judge, unless the defendant would also show that the plaintiff, at the time of opposing the prisoner's discharge, knew of the escape; but no proof of that fact was offered on the part of the defendant.

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The judge decided, that the act of the 5th *April*, 1810, *concerning escapes, &c. (33d sess. c. 187.)† passed after issue joined, and before the trial, was no bar to the plaintiff's action; and directed the jury to find a verdict for the plaintiff. The jury found a verdict, accordingly, for 478 dollars and 32 cents.

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† 2 R. S. 437.
sec. 64.

A motion was made to set aside the verdict, and for a new trial, which was argued at the last *August* term.

Rodman and *Van Vechten*, for the defendant. The plaintiff had two remedies; he might waive the *escape* and affirm the prisoner in custody; or he might proceed against the sheriff for the escape. His right of action for the escape had accrued previous to the prisoner's application for a discharge. Having opposed the discharge, in consequence of which the prisoner remained in custody, the plaintiff must be considered as having made his election as to his remedy. (4 *Johns. Rep.* 469. *Rawson v. Turner*.)

Before the act concerning escapes, passed the 5th *April*, 1810, (33d sess. c. 187.)‡ the court, in consequence of the act ‡ 2 R. S. 437. relative to gaol-liberties, were compelled to say, that where a prisoner is suffered to go within the liberties, on giving security to the sheriff, and he went beyond the liberties, a return or recaption before action would not excuse the sheriff, who must be left to his remedy on the bond. But the *third* section of that act declares the law to be, that notwithstanding the acts relative to gaols and gaol-liberties, a return or recaption before a suit is brought for the escape, shall be a good defence, as at common law. It is true, the escape in the present case was before the passing of that act, but though a right of action attached before the act, yet it was not consummated by a verdict. The court are now called upon to decide as to the construction of the act.

Henry, contra. After the escape, the plaintiff's right of action attached; and a suit was commenced before the pass-

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ing of the act. Is the act declaratory, or does it introduce a new rule? If the legislature intended to pass a retrospective law, and to take away vested rights, the language ought to have been clear and explicit, so as to leave no doubt of the intention. We cannot presume that the legislature meant that the statute should have a retrospective effect. The legislature cannot take away a vested right. No statute is to have a retrospect beyond the time of its commencement. (*Bac. Abr. Statute*, C. vol. 6. p. 370.) But the language and provisions of the act are clearly prospective. The case of *Tillman v. Lansing* (4 *Johns. Rep.* 45.) shows that this was a statutory escape, and not within the common law doctrine as to escapes.

But it is said the plaintiff made his election, and affirmed the prisoner in custody of the new sheriff. A voluntary escape cannot be purged, and the sheriff was fixed by the statute (2 *Wils.* 295.) If the sheriff permits an escape, he cannot retake the prisoner; but if the prisoner voluntarily returns, and is turned over to the custody of the new sheriff, he may avail himself of it; for he is not presumed to be conscious of the torts of his predecessor.

Again, there can be no election without knowledge; and it was not shown that when the plaintiff opposed the discharge of *Rudes*, he knew of the previous escape. The creditor has a right to the continued imprisonment of his debtor: and his consent to detain him in prison after his return, does not take away his right of action for the time he was out of prison. Such an election would be without an equivalent.

Cu. ad. vult.

The judges being divided, now delivered their opinions *seriatim*.

[* 481] YATES, J. The first question raised in this case is, whether the opposition of the plaintiff to the discharge of the defendant in the original suit, under the insolvent act, after the alleged escape had taken place, destroyed his right of action against the sheriff.

By this opposition, the plaintiff admitted an existing demand against the original defendant, which, undoubtedly, was the ground of his interference to prevent the discharge; but whether, at the time, he had knowledge of the escape, does not appear, nor do I think it material.

If he supposed the conduct of the prisoner fraudulent, or the measures adopted by him to obtain his discharge, illegal, he had a right to prevent it; and this could not impair his remedy against the sheriff, if any such remedy existed at the time. The case of *Ravenscroft v. Eyles* (2 *Wils.* 295.) would then be in point.

The next question is, whether the alleged escape is cured by the statute of 1810.†

† 2 R. S. ubi
sup.

By the facts disclosed, it does not appear that the defendant had knowledge of the prisoner's being without the gaol-liberties; and even if it had been known to him, he had no right to restrain him, but could only resort to his bond for a breach of the condition; and if that statute is inoperative, the same remedy must exist here as in the case of *Tillman v. Lansing*; yet there the sheriff evidently knew it, and had seen the prisoner without the gaol-liberties. Although, in this instance, it may be attended with peculiar hardship to the officer, the statutes upon which that decision is founded, if not explained by the last law, must continue to operate according to the construction given to them by this court. It must, however, be conceded, that this is a rigid interpretation of those statutes, manifestly intended for the benefit of debtors only, but destroying an existing remedy on the part of the officer; for at common law the defence now set up would have been sufficient to protect the sheriff; nor can I think that the legislature contemplated to increase his responsibility at the time; yet if the last law is disregarded, this must be the effect of *those statutes. It, therefore, remains for this court to determine whether the law of 1810 affords relief.

To say that the statutes so plainly manifest the intention of the legislature, in relation to the sheriff's responsibility, as to render the declaratory act inconsistent, is not warranted by what appears from the statutes themselves. I think the construction given to them by this court may well be viewed as unforeseen, and not intended, at the time they were passed; and that, without a violation of constitutional rights, that intention may properly become a subject of legislative explanation, so that no innocent man, by a literal construction, may receive damage, consonant to the rule laid down by Lord Coke, (1 Inst. 360.) that acts of parliament are to be so construed as no man that is innocent or free from injury or wrong, be, by a literal construction, punished or endamaged; and in that point of view, the last law is entitled to notice.

The third section of this statute enacts, that nothing contained in the act, entitled an act relative to gaols, or in the act rendering bonds taken for the gaol-liberties assignable, and for other purposes, shall be so construed, as to prevent any sheriff, in case of escapes, from availing himself as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer before an action shall be commenced for the escape.

It appears by this section, that such a construction shall be given to those statutes as not to prevent any sheriff from setting up the defence he had at common law; evidently embracing all such cases as have arisen since the statutes mentioned in this act were passed, and such as might thereafter be presented to the courts; otherwise it was not necessary to state

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the true interpretation of those statutes; the defence might have been secured to the officer without it.

If those statutes had explicitly avowed the intention of *the legislature, and the doctrine of escape now urged had been known and allowed to have been plainly established by them, legislative interposition in this way would be inconsistent and improper; but the principle had never been recognized by our courts until the decision of *Tillman v. Lansing*, which took place in *February* term, 1809; and at the ensuing session of the legislature, this law, explaining the true construction of the former statutes, was passed, securing to the sheriff the benefit of the defence, as stated in the above section.

I think this case is clearly distinguishable from a known vested right, to which the doctrine cited from 4 *Bac.* would apply; that no statute ought to have a retrospect beyond the time of its commencement; but when we are convinced that it was the received opinion, after the passing of the statutes relative to gaols and gaol-liberties, that sheriffs might avail themselves of this defence, and that those laws are not so positive as to supersede the necessity, or preclude the right of legislative explanation. Though the maxim of *communis error facit jus*, does not strictly apply, yet I am of opinion, under the circumstances of the case, the declaratory act must control this decision, and that the construction of the legislature must prevail.

There is nothing in the state constitution to prevent legislative interference; and being in the nature of a *tort*, and not a contract, this question cannot be affected by the constitution of the *United States*, which, in the 10th section, declares, that no state shall pass an *ex post facto* law, or law impairing the obligation of contracts.

If by an *ex post facto* law is intended all retrospective statutes, as well in relation to civil as criminal matters, then this court ought to pronounce the law in question nugatory, as being against the prohibition in the constitution of the *United States*; but I do not think that the definition of an *ex post facto* law can be extended beyond criminal matters; such laws are only intended, *as subject the citizen to punishment for an act done before the existence of the law, and declared criminal by such subsequent statute; or, according to Justice *Blackstone*, in his *Commentaries*, when, after an action (indifferent in itself) is committed, the legislature, for the first time, declares it to have been a crime, and inflicts a punishment on the person who has committed it.

It will not be pretended that the operation of this law could in any way impair the obligation of contracts. Hence it is manifest that the constitution of the *United States* does not reach this case.

I am, accordingly, of opinion, that the legislature were possessed of competent authority to pass this declaratory act; and

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that the defendant is entitled to his defence, as at common law, according to the construction given to the former statutes by this last law, and that, consequently, the verdict must be set aside, and a new trial granted.

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SPENCER, J. The only questions which it is necessary for me to consider, are, whether the third section of the act of the 5th of *April* last, (sess. 33. c. 187.)† extends to escapes which had then happened, whether suits are commenced or not; and whether, if it does, the legislature could pass such an act. It is enacted, that nothing contained in the act entitled an act relative to gaols, or in the act rendering bonds taken for the gaol liberties assignable, and for other purposes, *shall be so construed*, as to prevent any sheriff, in cases of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer before an action shall be commenced for the escape.

2 R. S. 457.

I have no difficulty in admitting the correctness of the position in *Bac. Abr. Statute*, C. (6 *Bac. Abr.* 370. *Gwillim's ed.*) that it is in general true, that no statute is to have a retrospect beyond the time of its commencement; *and that the law of parliament is, that regularly *nova constitutio futuris formam debet imponere, non præteritis*.

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The case of *Helmere v. Shuter and another*, or, as it is reported in some of the books, *Gillmore v. Shuter*, (2 *Show.* 17.) was decided on that principle. It was an action on a parol promise in consideration of marriage, made in 1676. The statute of frauds, 29 *Car.* II. c. 3. enacted, that no action shall be brought from and after the 24th *June*, 1677, whereby to charge any person upon any agreement in consideration of marriage, unless some note or memorandum in writing be signed, &c. In the report of this case in *Showcr*, which is quite full, *Scroggs*, Ch. J., *Wylde*, J., and *Jones*, J., said, they believed the intention of the makers of that statute was only to prevent for the future, and that it was a cautionary law, and if a motion was made in the House of Lords concerning it, they would all explain it so; besides, it would be a great mischief to explain it otherwise, to annul all promises by parol before that time, upon which men had trusted and depended, reckoning them good and valid in law, as they are yet amongst honest men; and, therefore, judgment was given for the plaintiff. The same case is reported in 2 *Mod.* 310. 1 *Freem.* 466. 2 *Lev.* 227. 2 *Jones*, 108. and 1 *Vent.* 330.

The case of *Couch, qui tam, v. Jeffries* (4 *Burr.* 2460.) was decided on the same principle; it was an action for the penalty for not paying the stamp duty upon an indenture. On the trial, the plaintiff had a verdict; and it was moved to stay entering the judgment, the defendant having, after the verdict, paid the duty, pursuant to an act which discharged persons

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who had incurred penalties, upon paying the duty by a certain day, and before which it had been paid ; and the question was, whether the act related to actions commenced before its passing. Lord *Mansfield* placed his opinion on the intention of the legislature, which, he supposed, could not have been to take away from the person, who had incurred a great deal of cost in prosecuting it, a vested right. Mr. Justice **Yates* observed, that the payment ought to be made so that it can be given in evidence at the trial, and that it would be strange to make a construction with a retrospect to punish an innocent man in favor of an offender.

In these cases, the inquiry was into the intention of the legislature, taking as a leading guide, in aid of the construction, the presumption that all laws are prospective, and not retrospective.

Statutes are to be so construed as may best answer the intention which the makers had in view, and the intention is, sometimes, to be collected from the cause or necessity of making a statute ; and a thing within the intention of the makers of a statute is as much within the statute as if it were within the letter. (6 *Bac. Abr.* 384. *Guillim's ed. Stat. I.* s. 5. and the cases there cited.) To ascertain the intention of the legislature, it is only necessary to consider, that prior to the case of *Tillman v. Lansing*, (4 *Johns. Rep.* 45.) decided in *February* term, 1809, the opinion had universally obtained, that a voluntary return of a prisoner, before action brought, (whether he had given bond for the gaol-liberties or not,) in case of a negligent escape, was a good defence to the sheriff ; and in deciding that case, we put a construction on the statute relative to gaols, (though I concurred in it,) which I thought a rigid and harsh one, as respected public officers ; because it rendered them liable to be drawn in question for acts which, when done, were supposed not to expose sheriffs, and after the lapse of many years, when their security, in many instances, may have become irresponsible.

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The act now under consideration does not, in terms, notice suits then existing, or escapes which had then taken place ; but it does what is tantamount. It addresses itself to the judges of our courts, and requires such a construction to be put on the two acts, as not to take away from sheriffs the right of availing themselves of recaption, *or the voluntary return of the prisoner before action brought. It is, in effect, a declaratory statute ; in form, a directory one ; and it would lead to a most absurd consequence to maintain, that after the legislature has spoken its will, as to the construction of the preëxisting statutes, for courts of justice to proceed and apply the condemned rule to a certain set of cases ; but with respect to cases precisely similar, though of a more recent date, adopt the construction required to be given. The statute does not profess to introduce a new rule, but considers sheriffs as always hav-

ing nad the right to protect themselves by recaption, or the voluntary return of the prisoner. If it was competent to the legislature to alter the law retrospectively, it appears to me that they have effectually done it.

The act implies that the legislature was dissatisfied with the exposition given to the statutes relative to gaols and gaol-liberties, and they manifestly intended to reinstate the law, as they conceived it was when the decision of *Tillman v. Lansing* took place.

If a new rule was to have been made, it is inconceivable that such terms should have been used; for a legislature to require a particular construction, contrary to the existing one, unless the anterior law would admit of the required construction, would be to require a flat absurdity. I understand the legislature as saying, in effect, we will not make a new rule, but we will require the law to be construed as it ought to have been.

It is idle, in this case, to talk of vested rights, to sue sheriffs for escapes, who have a defence arising from recaption, or a voluntary return of the prisoner, if that right existed when the act was passed, in the opinion of the legislature; and it in fact becomes a question, in this inquiry, whether the right was vested or not, which has the supremacy, the legislature or the courts of justice. The case in *Shower* stands on a very different ground. When that parol promise was made, it was unquestionably valid, and the promisee had a right to rely *on its fulfilment. So in the case of *Couch, qui tam, v. Jefferies*, the penalty had been incurred, and the right to prosecute for it became vested in the common informer. It had been prosecuted to verdict, and the plaintiff had become liable to his attorney for the costs; and, in fact, the defendant had lost his right to insist on the payment of the duty. He was entirely precluded by the verdict; and in both those cases, it required the clearest manifestation of the will of the legislature, that the acts should retrospect. The present is a case *stricti juris*. The decision in *Tillman v. Lansing* subjected either the sheriffs or bail, who are favorites with courts of justice, to the payment of money, contrary to the then general understanding of the profession, and all parties concerned; and I cannot forbear repeating the idea that the legislature, under a conviction that the construction put on the acts in question was incorrect in principle, and unjust in its operation, intended, by an exertion of the plenary powers they possess, to rescue future cases not adjudicated, from the construction of the statutes adopted by this court. The construction which they require is that which the legislature consider the correct one.

The remaining question is, whether the legislature are inhibited, by any constitutional restraints, from passing the act. It is in vain to search for any prohibition in the state constitution; and if the constitution of the *United States* denies to the

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state legislatures the right to enact such a statute, it must be in the 10th sect. of the first article, which provides that no state shall pass an *ex post facto* law, or law impairing the obligation of contracts. Is this act an *ex post facto* law, or does it impair the obligation of contracts? The term *ex post facto* is technical, and is to be construed according to the received and well understood meaning and import of it, when the constitution was adopted. Judge *Blackstone* (1 *Comm.* 46.) had explained the term. His work was *the most popular then extant, and it was in the hands of all professional gentlemen, and of those who devoted their time and service to the state. He says, "An *ex post facto* law is when, after an action (indifferent in itself) is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts a punishment upon the person who has committed it."

The "*Federalist*," a work of high celebrity, and which is understood to have been the production of three eminent statesmen and civilians, two of whom had been members of the convention which formed the constitution, agree that this definition is correct, and that it is so to be understood. But the term has received a judicial exposition in the Supreme Court of the *United States*, in the case of *Calder and Wife v. Bull and Wife*, (3 *Dall.* 386.) All the judges who gave opinions agree that the inhibition in the constitution, against passing *ex post facto* laws by the states, is to be understood as relating to laws respecting crimes, pains and penalties; and they substantially adopt Judge *Blackstone's* definition. Thus far, then, there can be no objection to the act.

It cannot admit of an argument that the act impairs the obligation of contracts, for the most conclusive of all reasons, because no contract exists in the case. It is an action for a *tort*, for the wrongful escape of a debtor from the sheriff's custody; and it would be a waste of time to cite authorities, which are numberless, that the escape being a *tort*, the remedy is lost, if the sheriff should die; and there would be no relief against his representatives.

A difficulty still more formidable has been suggested, not, however, growing out of the constitution, but which equally attacks the power of the legislature. It is, as I understand, this; can a legislature, after a construction has been given to a statute by the courts of law, alter that construction by an act which has a retrospect, so as to affect existing cases?

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It is not necessary to inquire whether a legislature can, *by the plenitude of its power, annul an existing judgment. This power I should undoubtedly deny, because there then immediately arises a contract against the party adjudged to pay a sum of money in favor of him to whom it is awarded; but the question is, whether such power is not necessarily inherent in sovereignty, before trial and before judgment, to alter the construction of a penal act, and to require courts of justice to ob

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serve the construction required to be made. On this point, we have two clashing decisions in the Supreme Court of the *United States*, if we may confide in the accuracy of the reporters who have published the decisions of that court. In the case of *Ogden, Adm'r., v. Blackledge, Ex'r., (2 Cranch's Rep. 272.)* the question was, whether an act of the state of *North Carolina*, passed in 1715, enacting that the creditors of deceased persons should make their claim within seven years after the death of the debtor, or otherwise be for ever debarred, was a bar to the creditors' recovering. That act had been virtually repealed in 1784, and absolutely in 1789; but in 1799, and after that suit was brought, an act was passed explanatory of the act of 1789, and declaring that it should not be considered a repeal of that part of the act, passed in 1715, which created the limitation. The court, in giving judgment for the plaintiff, declared their opinion to be, that the act of 1715 was no bar to the plaintiff's action, it having been repealed by the act of 1789. Not a word is said, by the court, on the operation of the act of 1799; and no reasoning is gone into, to evince the want of power in the legislature, to pass the explanatory act of 1799, though it must be conceded that the court disregarded that act, or their judgment must have been different. Whatever my respect may be for that high tribunal, I cannot consent to be bound by a decision at variance, not only with an anterior decision of the same court, but so entirely destitute of reasoning or authority to support it.

*The other case to which I allude, is that of *Calder and Wife v. Bull and Wife*, before cited. It was this; on the 21st of *March*, 1793, the Court of Probates for *Hartford* county disapproved of the will of *N. Morrison*, and refused to record it. No appeal was made from that decree in 18 months, and by that neglect, and a statute of *Connecticut*, all right of appeal was barred. In *May*, 1795, the legislature of *Connecticut* passed a resolution, or law, setting aside the decree, and granted a new hearing by the same Court of Probates, with a right of appeal in six months. A new hearing took place; the will was approved and ordered to be recorded; an appeal was carried to the Superior Court of the state, who affirmed the decree; and, on an appeal from that court to the Court of Errors of *Connecticut*, it was adjudged there were no errors; and from that court it came before the Supreme Court of the *United States*, where the judgment was affirmed.

In the progress of the cause, it appeared that the legislature of *Connecticut* had, in two instances, since 1762, by resolutions, or acts, granted new trials in the courts of law; and although it perplexed the judges, whether to consider them as acting judicially, or legislatively, they discussed the cause on both principles. It would seem to me most certain, that it was utterly inconsistent with every principle of judicature to set aside the operation of a law of the state, which had barred the appeal,

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and adjudge a new law, opening it and limiting a new appeal in that case to six months. Indeed, it surpasses my power of comprehension, to understand how a legislature can be said to act judicially, in ordering a new hearing in another court, when it was not possessed of the cause, either by appeal or writ of error. It certainly was a legislative act, in its extent of power, and in its operation, much surpassing the act under consideration, should it be construed to extend to cases *which have already happened, and which have not been adjudicated.

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I shall not undertake to state the arguments of the judges, for considering the law or resolution of the legislature of *Connecticut* valid ; but to me their reasoning appears unanswerable ; that the constitution having imposed no limits on the legislative power reaching the present case, the consequence is, that whatever the legislative power chooses to enact, would be lawfully enacted, and the judicial power cannot interpose to pronounce it void. *Iredell*, Justice, lays down this position ; and the decision of the court, in the particular case, sanctions it. *Paterson*, Justice, who was a member of the convention which formed and proposed the constitution of the *United States*, says, "he had an ardent desire to have extended the provision in the constitution to retrospective laws in general ;" and after some observations on the impropriety of such laws, he concludes, "But on full consideration, I am convinced, that *ex post facto* laws must be limited in the manner already expressed ;" evidently meaning, that a retrospective law, as such, was not prohibited by the constitution.

This case I conceive to be a solemn determination of the question before us ; and proving that the act cannot be objected to, because it is retrospective, if it be not an *ex post facto* law, or a law impairing the obligation of contracts.

The construction of statutes, undoubtedly, is a judicial function, subject, however, to the uncontrollable power of the legislature, to alter that construction in cases which have not passed to judgment ; and I must insist, that our state legislature, when acting within the pale of the constitutions of the *United States* and of this state, has the same omnipotence which Judge *Blackstone* ascribes to the *British* parliament: "It has sovereign and uncontrollable authority, in the making, confirming, restraining, abrogating, repealing, reviving and *expounding* of laws, *concerning all matters of all possible denominations." (1 *Bl. Comm.* 160.)

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Upon the fullest consideration, I am of opinion, that the act of the 5th of *April* reaches this case, and that it is free from any constitutional objections.

THOMPSON, J. Whether the act of the 5th of *April*, 1810, (33d sess. c. 187.)† shall affect the plaintiff's remedy against the sheriff, when not only the cause of action existed, but the suit had been *actually instituted before* the passing of the act, 260

is the question which we are called upon to decide. This act declares, that nothing contained in the act relative to gaols, passed the 30th of *March*, 1801, or in the act rendering bonds, taken for the gaol-liberties, assignable, passed the 28th of *March*, 1809, shall be so construed as to prevent any sheriff, coroner, or other officer, in cases of escapes, from availing himself, as at common law, of a defence arising from recaption on fresh pursuit, and a return of the prisoner, within the custody of such officer, before the action shall be commenced for the escape.

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According to the unanimous opinion of this court, in the case of *Tillman v. Lansing*, (4 *Johns. Rep.* 45.) the true construction of the act of 1801, above referred to, went to take from the sheriff a right which he had at common law, to avail himself of a voluntary return of the prisoner, before suit brought, as a defence in an action against him for the escape. Under this construction of that statute, the present suit was brought, and, according to the facts found in the case, the plaintiff's right to recover against the sheriff was complete, and his suit pending, at the time the statute, which is now said to divest him of that right, passed. It is repugnant to the first principles of justice, and the equal and permanent security of rights, to take, by law, the property of one individual, without his consent, and give it to another. The principle contended for, on the part of the defendant, *inevitably leads to, and sanctions, such a doctrine. For if the plaintiff can be deprived of his remedy already vested, with equal propriety might he be compelled to refund the money, had he actually received it. But we are not called upon to give effect and operation to a statute, admitting, in my judgment, of a retrospective construction. That the plaintiff had a vested right and remedy against the sheriff, on the 5th of *April*, 1810, cannot be doubted. It is a settled and established principle in *England*, that the power of construing statutes belongs to the courts of justice. (6 *Bac. Abr.* 178. *Hob.* 346.) This principle receives additional strength with us, when the boundaries between the legislative and judicial departments of the government are so well defined, and cautiously guarded. If, then, the construction of the act of 1801 belonged to the courts of justice, the interpretation given to it by this court became the fixed and settled rule of law, until altered by a superior tribunal, or by the legislature. It is not now, nor has it, at any time, been pretended, but that the construction given to that statute, was the true and only one of which it was susceptible. It follows, therefore, as a necessary consequence, that the plaintiff, at the commencement of his suit, had a vested right of recovery against the sheriff.

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The next inquiry is, whether the legislature, by the act of the 5th of *April*, have taken away this right. It is unnecessary here to examine whether a law, admitting of such a construction, would be binding upon this court, because I am well satisfied, that, according to the settled rules of interpretation,

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the one now before us will not admit of such a construction. If it was proper and necessary to inquire into the intention of the legislature, *aliunde*, by reference to other statutes on the same subject, the act of the 28th of *March*, 1809, affords a very strong inference that the act of the 5th of *April* was not intended to have a retrospective operation. That act was passed only one month after the decision in *the case of *Tillman v. Lansing*, and was in affirmance of the construction given by this court to the act of 1801; because it was made for the express purpose of meeting and removing some of the difficulties suggested by the court in that case; such as making the bonds, taken by the sheriff for the liberties, assignable, and authorizing the court, in case the plaintiff refused to take such assignment, to stay the proceedings against the sheriff, until he should have a reasonable time to prosecute such bond, and expressly declares, that this provision shall extend, as well to *suits now pending as to those hereafter to be commenced*. The sense of the legislature is here clearly shown, that without this express provision, the statute would not extend to suits then pending. It is reasonable, therefore, to conclude, that when the same subject was again under consideration, the next year, if it had been intended that the act then passed should affect suits already pending, it would, as in the other law, have been expressly so declared. The general rule is, that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of parliament is, that *nova constitutio futuris formam debet imponere, non præteritis*. (6 *Bac. Abr.* 370. 2 *Inst.* 292.) *Blackstone*, in his *Commentaries*, treats it as a first principle, that all laws are to commence *in futuro*, and operate prospectively. (1 *Comm.* 44.) After referring to the unjust and iniquitous practice of the *Roman* emperor, (*Caligula*), as to the manner of writing and publishing his laws, he observes, that there is still a *more unreasonable* method than this, which is called making laws *ex post facto*. Although, technically speaking, the term *ex post facto* may be applicable only to laws punishing criminal offences, the principle is equally applicable to civil cases. An act of the legislature ought never to be so construed as to do injustice. Lord *Coke* lays down the rule to be, (*Co. Litt.* 360. a.) that acts of parliament are to be so construed, as that no man who is innocent, or free from injury or wrong, *shall, by a literal interpretation, be punished or endamaged. Giving to the act now under consideration a retrospective operation, would manifestly be productive of these consequences; for it not only takes away a vested right, but punishes and endamages the plaintiff, in the payment of costs. If his action is defeated, and his right of recovery taken away by this statute, he not only loses his own costs, but will be obliged to pay costs to the defendant. It never can be presumed, from the general words of this statute, that the legislature intended that it should work such injustice. Nothing

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short of the most direct and unequivocal expressions would justify such a conclusion. The best settled rule of construction given by the *English* courts to the statute of frauds, (29 Car. II. c. 3.) goes strongly in corroboration of the interpretation I have given to the act before us. The language of that statute is, "that from and after the 24th of June, 1677, no action shall be brought, whereby to charge any person upon an agreement in consideration," &c. Yet it has been uniformly held, that it would not retrospect, so as to take away a right of action to which a party was before that time entitled, but applied only to *promises made after the 24th of June, 1677.* (4 Burr. 2560. 2 Shower, 17. 2 Mod. 310. 1 Vent. 330.)

The act of the 5th of April, 1810, can be viewed in no other light than as introducing a *new rule of law*. It does not purport to be an explanatory statute, or profess to give a different construction to the act of 1801 than had been given to it by this court. But the legislature, proceeding on the ground that a competent tribunal had declared, that under that act sheriffs could not avail themselves of a voluntary return of a prisoner, before suit brought, in discharge of their liability for an escape, as they might have done at common law, thought proper to restore to sheriffs this common law right, which had been taken away by the statute of 1801, and so far to repeal that statute. It is an undeniable *rule of construction, that a subsequent statute, making a different provision on the same subject, is not an explanatory act, but an implied repeal of the former, which is precisely the case here. I do not, therefore, perceive any possible escape from the conclusion, that the act under consideration establishes a *new rule of law*, and as such ought not to have a retrospective operation, unless so declared, in the most unequivocal manner, which it certainly is not.

But if we consider this in the nature of an *explanatory act*, it will operate equally against the defendant's construction; for such statutes are to be construed only according to the words, and not with any equity or intendment, as was resolved in *Butler and Baker's* case, (3 Coke, 35. a.) for if any exposition should be made against the direct letter of the exposition made by parliament, there would be no end to expositions. So in the case of *Dalbury Parish v. Foster*, (Carthew, 396.) the doctrine laid down is, that when one statute is made explanatory of another, the court cannot vary the explanation further than is expressed in the statute. Where the statute of explanation is doubtful, it may have such exposition as shall be taken to stand with the scope and intention of the statute, and which shall be *reasonable*, as was held by the court, in *Godfrey v. Wade*, (Jones, 35. 19 Vin. 517. note.) An act which is to take away or clog a remedy which a party has by the *common law*, shall not be taken by equity; (19 Vin. 514.) and there is no reason why the same rule should not apply, where a remedy given by the *statute* is to be taken away. Construing this act

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grammatically, according to the words, the provision is *prospective*, "that nothing in the former act *shall be construed to prevent*," &c. If the construction be *doubtful*, and the rule in *Godfrey and Wade* be applied, can it for a moment be questioned, that it is more just and *reasonable* to confine it to cases arising, or at *all events, to suits brought *after* the passing of the act, so as not to punish plaintiffs with costs, when they had a good and valid cause of action at the commencement of the suit. In the case of *Ogden v. Blackledge*, (2 *Cranch*, 272.) in the Supreme Court of the *United States*, the effect and operation of an *explanatory* statute was under consideration. In that case, as in this, the statute was passed *after* the commencement of the suit. And it was urged by counsel, that if the *suit* had been brought *after* the passing of the explanatory act, it would not alter the past law, and make that to have been law which was not law at the time. To declare what the law *is*, or *has been*, is a *judicial power*; to declare what the law *shall be*, is legislative. One of the fundamental principles of all our governments is, that the legislative power shall be separate from the judicial. But that, at all events, the statute could not affect *that suit*, which was brought *before* the law was passed. The court stopped the counsel, considering the question as too plain to be argued. This case is precisely in point, and although not binding on this court, is entitled to high respect and attention. The language of *Raymond, J.*, in the case of *Wilkinson v. Myer*, (2 *Ld. Raym.* 1352.) seems to imply, that laws denominated *ex post facto* are not confined to criminal cases. Speaking of the statute of *Geo. I.* relative to registering contracts for *South Sea* stock, he says, this act being *ex post facto*, the construction of the words ought not to be *strained*, in order to defeat a *contract*, to the benefit whereof the party was well entitled at the time the contract was made. Admitting this not to have been technically an *ex post facto* law, as I have no doubt it was not, yet it shows the light in which, according to the opinion of the judge, all retrospective laws are to be viewed, and the rules of construction applicable to them. The exposition of the prohibition in the constitution of the *United States*, against passing *ex post facto* laws, came before the Supreme Court of the *United States*, in the case of *Calder v. Ball*, (3 *Dallas*, 386.) where it was held, that the prohibition applied only to criminal, and not to civil cases. The law there under consideration was viewed rather as a judicial than a legislative act; it being a mode of obtaining a new trial, authorized by the course of judicial proceedings in the state of *Connecticut*. And, at all events, if it was to be considered a legislative act, it not being an *ex post facto* law, within the meaning of the constitution, it did not belong to that court to declare it void. Although the point in judgment, in that case, is not directly applicable to the one before us, yet the doctrine of the judges against retrospective laws in general is founded in so much

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good sense and sound policy, that it is not only deserving of notice, but worthy of adoption. Chase, J., said, every *ex post facto* law must necessarily be retrospective, but every retrospective law is not an *ex post facto* law; the former only are prohibited by the constitution. Every law that takes away or impairs *rights vested* agreeable to existing laws, is retrospective, and is generally unjust, and it is a good general rule, that a law should have no retrospect. And he urges, as a reason why the constitution did not prohibit all retrospective laws, that it is not to be presumed that the federal or state legislatures will pass laws to deprive citizens of rights vested in them by existing laws, unless for the benefit of the whole community, and on making full satisfaction. Paterson, J., observed, that the words *ex post facto*, when applied to a law, have a technical meaning, and refer to crimes, pains and penalties. But, says he, I had an ardent desire to have extended the provisions of the constitution to *retrospective* laws in general, for there is neither policy nor safety in such laws, and, therefore, I have always had a strong aversion against them. It may, in general, be truly observed of **retrospective* laws of every description, that they neither accord with sound legislation, nor the fundamental principles of the social compact. If such be the light in which retrospective laws ought to be received, how unjust the imputation against the legislature, that they intend a law to be of that description, unless the most clear and unequivocal expressions are adopted. I am satisfied the law before us does not necessarily, or even reasonably, admit of such an interpretation, and of course cannot affect the present action.

There is no weight in the objection, that the plaintiff's opposition to the prisoner's discharge from imprisonment was a waiver of his claim on the sheriff for the escape. He knew nothing of the escape when he opposed the discharge, and this was essential, in order to charge him with having made an election of remedies, according to the decision of the court, in the case of *Rawson & Turner*; (4 Johns. Rep. 474.) A party can never be said to have made an election between two remedies, when he was totally ignorant of one of them. I am, accordingly, against the motion for a new trial.

KENT, Ch. J. The motion on the part of the defendant for a new trial was made upon two grounds:—

1. That the plaintiff affirmed his debt, in custody, subsequent to the escape.

2. That the statute of the 5th of *April* last allows the defendant to avail himself of the return of the prisoner before suit brought.

1. The mere fact of opposing the debtor's discharge without having, at the time, any knowledge of the previous escape, cannot conclude the plaintiff. He undoubtedly might, with knowledge of the escape, have waived his remedy against the

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defendant, and have elected to affirm his debtor in custody under the succeeding sheriff; but, without such knowledge, the law will not infer any determination of the party prejudicial *to his rights. It would be equally unjust and absurd to conclude, that the plaintiff had waived his remedy for the escape, when he was ignorant of the fact. "Election," says *Dyer*, (*Dyer*, 281. a.) "is the internal, free and spontaneous separation of one thing from another, without compulsion, consisting in the mind and will."

2. The next question is, whether the act of the 5th of *April* last created any new plea in bar of the action.

† 2 R. S. 433.
sec. 40.

‡ 2 R. S. 436.
sec. 55.

The words of the act are, "that nothing contained in the act entitled, an act relative to gaols, passed *March 30*, 1801.† or in the act entitled, an act rendering bonds taken for the gaol-liberties assignable, and for other purposes, passed *March 28*, 1809,‡ shall be so construed as to prevent any sheriff, coroner or other officer, in cases of escapes, from availing himself, as at common law, of a defence arising from a recaption on fresh pursuit, and a returning of the prisoner within the custody of such officer, before an action shall be commenced for the escape."

As this act was passed, not only after the escape in question, but after suit brought, it cannot apply to and govern this case, but in one of two ways. It must be considered either as creating a new rule for the government of the past case, or as declaring the interpretation of the former statutes for the direction of the courts.

I think it can be shown, that upon principles of law and the constitution, the act cannot be adjudged to operate in either of those points of view; and I should be unwilling to consider any act as so intended, unless that intention was made manifest by express words, because it would be a violation of fundamental principles, which is never to be presumed.

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This act, according to a very natural and reasonable construction, is prospective, and applies only to escapes happening after the passing of it. If it meant that the *provision in the act giving the plea, should apply to past escapes, why did it limit suits for such escapes to six months, and for future escapes to one year? The very great reduction of the time of limitation in the first case, must have been made on the ground of the supposed hardship of the then existing law. There would have been no reason for varying the period of limitation, if the same beneficial plea was intended to apply to both cases. The language of the section in question is strictly and grammatically applicable only to actions to be commenced;—"before an action shall be commenced for the escape." I am persuaded that the act was understood in the council of revision to read prospectively, or it would not have passed without further consideration. This construction is agreeable to those settled rules which the wisdom of the common law has established for

the interpretation of statutes, as it is not inconvenient, nor against reason, and injures no person. A statute is never to be construed against the plain and obvious dictates of reason. The common law, says Lord Coke, (8 Co. 118. a.) adjudgeth a statute so far void, and upon this principle the Supreme Court of *South Carolina* proceeded, when it held, (1 Bay, 93.) that the courts were bound to give such a construction to a statute as was consistent with justice, though contrary to the letter of it. The very essence of a new law is a rule for future cases. The construction here contended for, on the part of the defendant, would make the statute operate unjustly. It would make it defeat a suit already commenced, upon a right already vested. This would be punishing an innocent party with costs, as well as divesting him of a right previously acquired under the existing law. Nothing could be more alarming than such a subversion of principle. A statute ought never to receive such a construction, if it be susceptible of any other, and the statute before us can have a reasonable object and full operation without it. In the case of **Beadleston v. Sprague*, (6 Johns. Rep. 101.) this court unhesitatingly acknowledged the principle, that a statute is not to be construed so as to work a destruction of a right previously attached. We are to presume, out of respect to the lawgiver, that the statute was not meant to operate retrospectively; and if we call to our attention the general sense of mankind on the subject of retrospective laws, it will afford us the best reason to conclude, that the legislature did not intend in this case to set so pernicious a precedent. How can we possibly suppose, that in so unimportant a case, when there were no strong passions to agitate, and no great interest to impel, that the legislature coolly meant the prostration of a principle which has become venerable for the antiquity and the universality of its sanction, and is acknowledged as an element of jurisprudence?

A review of the cases on this subject may be interesting and instructive.

It is a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. *Nova constitutio futuris* *Bracton* and *Coke*; and in *Gilmore v. Shuter*, (2 Mod. 310. 228. 2 Inst. 292.) This was the doctrine as laid down by *formam debet imponere, non præteritis*. (*Bracton*, lib. 4. fol. 2 Lev. 227. 2 Jones, 108.) it received a solemn recognition in the Court of K. B. In that case, a suit was brought after the 24th of June, 1677, upon a parol promise made before that date, but to be performed after that date, and the question was, whether it was void by the statute of frauds and perjuries, which enacted, that "from and after the 24th of June, 1677, no action should be brought to charge any person upon any agreement made in consideration of marriage, &c., unless such agreement be in writing," &c. It was admitted that the prom-

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ise declared on was of the same kind with those mentioned in the statute; but the court agreed unanimously, that the statute was *to be read by a transposition of the words, for that it was not to be presumed that the act had a retrospect to take away an action to which the plaintiff was then entitled, and that the other construction would make the act repugnant to common justice. When we consider that this decision was pronounced as early as the reign of *Charles II.* we are forcibly impressed with the spirit of equity, and the independence of the *English* courts. So again, in the modern case of *Couch v. Jeffries*, (4 Burr. 2460.) which was a *qui tam* suit for a penalty, the question was, whether a statute passed after the commencement of the suit, allowing delinquents, by such a day, to pay a stamp duty, and rid themselves of the penalty, should affect the case of a suit already commenced, and the Court of K. B. unanimously determined that it could not. "It can never be the true construction of this act," said Lord *Mansfield*, "to take away this vested right, and punish the innocent pursuer of it with costs."

The maxim in *Bracton* was probably taken from the civil law, for we find in that system the same principle, that the lawgiver cannot alter his mind to the prejudice of a vested right. *Nemo potest mutare consilium suum in alterius injuriam.* (Dig. 50. 17. 75.) This maxim of *Papinian* is general in its terms; but Dr. *Taylor* (*Elements of the Civil Law*, 168.) applies it directly as a restriction upon the lawgiver; and a declaration in the *Code* leaves no doubt as to the sense of the civil law. *Leges et constitutiones futuris certum est dare formam negotiis, non ad facta præterita revocari, nisi nominatim, et de præterito tempore, et adhuc pendentibus negotiis cautum sit.* (Cod. 1. 14. 7.) This passage, according to the best interpretation of the civilians, relates not merely to future suits, but to future, as contradistinguished from past contracts and vested rights. (*Perezii Prælec. h. t.*) It is, indeed, admitted, that the prince may enact a retrospective law, provided it be done expressly; for the will *of the prince, under the despotism of the *Roman* emperors, was paramount to every obligation. Great latitude was anciently allowed to legislative expositions of statutes; for the separation of the judicial from the legislative power was not then distinctly known or prescribed. The prince was in the habit of interpreting his own laws for particular occasions. This was called the *interlocutio principis*; and this, according to *Huber's* definition, was, *quando principes inter partes loquuntur, et jus dicunt.* (*Prælec. Juris Rom.* vol. 2. 545.) No correct civilian, and especially no proud admirer of the ancient republic, (if any such then existed,) could have reflected on this interference with private rights and pending suits, without disgust and indignation; and we are rather surprised to find, that under the violent and irregular genius of the *Roman* government, the principle before us should have

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been acknowledged and obeyed to the extent in which we find it. The fact shows, that it must be founded in the clearest justice.

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Our case is happily very different from that of the subjects of *Justinian*. With us, the power of the lawgiver is limited and defined; the judicial is regarded as a distinct, independent power: private rights have been better understood and more exalted in public estimation, as well as secured by provisions dictated by the spirit of freedom, and unknown to the civil law. Our constitutions do not admit the power assumed by the *Roman* prince; and the principle we are considering is now to be regarded as sacred. It is not pretended that we have any express constitutional provision on the subject; nor have we any for numerous other rights dear alike to freedom and to justice. An *ex post facto* law, in the strict technical sense of the term, is usually understood to apply to criminal cases, and this is its meaning, when used in the constitution of the *United States*; yet laws impairing previously acquired *civil* rights are equally within the reason of that prohibition, and equally to be condemned. We have seen that the *cases in the *English* and in the *civil law* apply to such rights; and we shall find, upon further examination, that there is no distinction in principle, nor any recognized in practice, between a law punishing a person criminally, for a past innocent act, or punishing him civilly by divesting him of a lawfully acquired right. The distinction consists only in the degree of the oppression, and history teaches us that the government which can deliberately violate the one right, soon ceases to regard the other.

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There has not been, perhaps, a distinguished jurist or elementary writer, within the last two centuries, who has had occasion to take notice of retrospective laws, either civil or criminal, but has mentioned them with caution, distrust or disapprobation. Numerous authorities might be cited, but I will select only two, and those no ordinary names. Lord *Bacon* gives more toleration to retrospective, and particularly to declaratory laws, than can now be admitted, under our more precise and accurate distribution and limitation of the powers of government; yet he was, at the same time, duly sensible of their danger and injustice. He confines them to special cases, limits them with solicitude, and speaks of them in general with reproach. *Leges quæ retrospectivæ raro, et magna cum cautione sunt adhibendæ; neque enim placet Janus in Legibus.—Cavendum tamen est, ne convellantur res judicatæ.—Leges declaratorias ne ordinato, nisi in casibus, ubi leges cum justitia retrospectivæ possint.* (De Aug. Scient. Lib. 8. c. 3. Aphor. 47—51.) *Puffendorf* lays down, without any qualification, a general and pointed condemnation of all such laws; he says, "a law can be repealed by the lawgiver, but the rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with a law

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all the effects which it had produced. Suppose, for example, that there exists a law that the father of a family may dispose *of his property by will, the legislature may, without doubt restrain this unlimited right of disposing by will, but it would be unjust to take away the property acquired by will during the existence of the former law." (*Droit de la Nat. L. 1. c. 6. s. 6.*)

The constitution of *New Hampshire*, established in 1792, has an article, in its bill of rights, that "retrospective laws are highly injurious, oppressive and unjust; and that no such laws should be made, either for the decision of civil causes, or the punishment of offences." It was also an article in the constitution, established for the *French* republic, in the year 1795, that no law, criminal or civil, could have a retro-active effect:—"Aucune loi, ni criminelle, ni civile, ne peut avoir d'effet rétroactif." Even *French* despotism, atrocious as it is in practice, yields, in its laws, to the authority of such a principle; for the same limitation is laid down as a fundamental truth in the code now in force under the sanction of the *French* empire. (*Code civil des Français*, No. 2.) And as often as the question has been brought before the courts of justice in this country, they have uniformly said, that the objection to retrospective laws applies as well to those which affect civil rights, as to those which relate to crimes.

In the case of *Osborne v. Huger*, (1 *Bay's Rep.* 179.) which came before the Supreme Court of *South Carolina* in 1791, the question arose upon a statute relative to the duty of sheriffs as to civil process; the court rejected the construction of a retrospective operation of the statute, according to its literal meaning; and Judge *Burke*, in particular, said that he should not be for construing a law so as to divest a right; and that a retrospective law, in that sense, would be against the constitution of the state. The judges of the Supreme Court of the *United States*, in the case of *Calder v. Bull*, (3 *Dallas*, 386.) speak in strong terms of disapprobation of all such laws; and in *Ogden v. Blackledge*, (2 *Cranch*, 272.) *they considered the point too plain for argument, that a statute could not retrospect, so as to take away a vested civil right.

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This train of authority, declaratory of the common sense and reason of the most civilized states, ancient and modern, on the point before us, is sufficient, as I apprehend, to put it at rest; and to cause not only the judicial, but even the legislative authority to bow with reverence to such a sanction.

It is equally inadmissible to consider the act as declaring how the former statutes were to be construed, as to cases already existing. If this interpretation was to be considered as giving the former acts a new meaning, it then becomes a new rule, and is to have the same effect, as any other newly created statute. But if it be considered as an exposition of the former acts for the information and government of the

courts in the decision of causes before them, it would then be taking cognizance of a judicial question. This could not *possibly* have been the meaning of the act, for the power that makes is not the power to construe a law. It is a well settled axiom that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion. Our government, like all the other free governments upon this continent, and like the only free government, at present, remaining in *Europe*, consists of departments, and contains a marked separation of the legislative and judicial powers. The constitutions of several of the *United States*, and among others, those of *Massachusetts* and *Virginia*, have an express provision, that the legislative and judicial powers shall be preserved separate and distinct, so that one department shall not exercise the functions belonging to the other. Most of the models of a free and limited constitution which were produced in *Europe*, under the impulse of the late revolution, and which had any pretensions to skill or wisdom, and particularly the new constitutions of *Poland* *and *France* in 1791, and of *France* in 1795, contained the same provision, in language more or less explicit. And if it be not found in our own constitution, in terms, it exists there in substance; in the organization and distribution of the powers of the departments, and in the declaration that the "supreme legislative power" shall be vested in the senate and assembly. No maxim has been more universally received and cherished as a vital principle of freedom. And without having recourse to the authority of elementary writers, or to the popular conventions of *Europe*, we have a most commanding authority, in the sense of the *American* people, that the right to interpret laws does, and ought to belong exclusively to the courts of justice.

For these reasons, I consider that the case before the court ought to be decided precisely as if the act of the 5th of last *April* had not been passed. The point then is, whether, by the act of 1801, the defendant was liable for the voluntary escape of his prisoner, in 1807, from the liberties, notwithstanding the immediate return of the prisoner. If the sheriff had allowed to his prisoner the liberties of the gaol, without taking a bond of indemnity, he might have pleaded a recaption before suit brought. This was so declared in the case of *Peters & Gedney v. Henry*, (6 *Johns. Rep.* 121.) and the reason is, that the sheriff, in that case, may restrain the prisoner at his pleasure, and deny him the liberties, for he is not bound to give them, until he receives, or is offered, a competent indemnity. And if the prisoner should, at any time, voluntarily go out of the liberties, the sheriff would then, probably, be obliged to confine him in close custody, or be responsible thereafter, as for a voluntary escape, according to the doctrine in *Bonafous v. Walker*. (2 *Term Rep.* 126.) It is stated in this case that the debtor was admitted to the liberties, on giving bail, and the decision in *Tillman v. Lansing* (4 *Johns. Rep.* 45.) is,

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therefore, in *point. If I was satisfied that the court in that case had mistaken the law, I should be willing, with my brethren, to correct the mistake; but the more I reflect upon the subject, the more I am persuaded that *that* decision was a just exposition of the law, as it then stood, and that the defendant is answerable for the escape.

The principles and ground of that decision are so reasonable and just, that they must have met with universal assent from the intelligent part of the community.

The sheriff was bound to give his prisoner the liberties, upon receiving a sufficient bond of indemnity; and when he took the bond, he had no further control over the prisoner. He could not prevent him from going at large, nor punish him if he did. The condition of the bond, according to the words of the statute, was, "that he remain a true and faithful prisoner, and shall not, at any time, nor in any wise, escape, or go without the limits of the liberties, until discharged by due course of law." It was proved that the prisoner, in that case, as well as here, did frequently and wilfully go without the limits of the liberties, contrary to the condition of his bond; and if the sheriff was not responsible, because he could show that the prisoner had returned before suit brought, it would have gone, in a great degree, to have rendered imprisonment illusory, as to all prisoners who were able to tender the sheriff competent security. If the sheriff was not responsible to the creditor, the prisoner was not responsible to the sheriff. Prisoners would have been able to go whenever and wherever they pleased, only taking care to return within the limits before any process was sued out against the sheriff. If the creditor lived remote, it might be months before he had knowledge that his debtor was abroad, despising the coercion of the law; and when he attempted to prosecute the sheriff, he might find that the debtor had cunningly returned within the limits, and was only waiting a fit occasion to make another escape. A law that could have been eluded in this *way, would have been a disgrace to the government. The statute creating gaol-liberties was passed for humane purposes. Debtors now have comfortable accommodations, and a large space to occupy, in which they can carry on their business and enjoy the comforts of society. It would be a gross abuse of this act of humanity, to seek under it a shelter for fraud. The construction adopted by the court was such as to reach this abuse; and as the law then stood, no other construction would reach it, for the bonds were not assignable to the creditor. It was a construction not only reasonable, (for the law of 1801 never meant that the bond should be broken with impunity, as it said "that nothing in the act should be construed to exonerate the sheriff, in case any such prisoner should escape and go at large without the said liberties,") but it was attended with salutary results. It tended to make prisoners what

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they ought to be, and what they bind themselves by their bonds to be, "true and faithful." The sheriff has not means or authority to guard the limits. There is no restraint upon the prisoner but the bond, and he ought to be continually conscious that it will be forfeited and exacted on the first wilful disobedience. If he will "go without the limits of the liberties," he ought to pay the penalty for his violation of duty and the faith of contract. To have allowed the plea of recaption or return before suit brought, as the law was at the time of the decision in *Tillman v. Lansing*, would have been the same, in effect, as to have allowed it to the prisoner on his bond of indemnity, and that would have been monstrous. There could not, strictly, be any recaption in the case; for the sheriff loses his coercion of the prisoner when he takes the bond. To talk of retaking the prisoner and replacing him within the liberties, from whence he might immediately depart, would be ridiculous. The sheriff's only plea could be, that the prisoner had voluntarily escaped, had forfeited his bond, and had voluntarily returned before suit; and if it was good for him, it excused the prisoner. That decision was therefore founded, not only on the most reasonable interpretation of the act of 1801, but on the soundest principles of justice. The law enabled the sheriff to provide himself with ample security, and armed him beforehand with his indemnity; and therefore the reason of allowing the plea of recaption did not apply. That plea was granted by way of excuse to the sheriff, to save him from grievous losses in cases where he would have been without remedy. But where he had his certain remedy over, there was no necessity for the excuse, and the common law did not originally allow it. Thus, if the gaol be broken by public enemies, and the prisoners escape, this, say the books, excuses the sheriff, because he has no remedy against them; but if it be broken by rebels, it does not excuse him, for he has his remedy over. There was no more hardship in obliging the sheriff to take this bond at his peril, than there is in his taking a bail-bond at his peril; and that has been the law for centuries.

The courts in *Massachusetts* construe the bonds taken in that state, for gaol-liberties, with the same strictness. In *Bartlett v. Willis and others*, (3 Tyng, 86.) a bond was given by the prisoner for the gaol limits, conditioned "that he should continue a true prisoner in the custody of the gaoler, and within the limits of the said prison;" and it was held that the prisoner's going, in the night time, to a pump for water, which was without the limits, was an escape, and the debt was recovered upon the bond.

The act of the 5th of last *April*, which allows the sheriff to plead the prisoner's return before suit, and which does not apply to this case, for the reasons which have been mentioned, does not, however, open the door to the abuses which were met by the decision in the case of *Lansing*; for the prisoner's

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bond is now assignable to the creditor, and no such plea can be made to the suit upon the bond. The statute only allows it when the *suit is brought against the sheriff. Hereafter, the creditor, in case of his debtor's escape from the liberties, must take an assignment of the bond; or if he does not choose to confide in the competency of the sureties, he must resort to the sheriff, and take his chance of this plea, and of his being able to meet it. If the sheriff is careful in taking good security, there can be very little danger of abuse of the privilege of the liberties by the debtor; and if the sheriff, by fraud or connivance with the debtor, should avoid taking good security, for the purpose of allowing these escapes and returns before suit brought, he would be chargeable as for a voluntary escape. In the present case, the creditor has elected to sue the sheriff; and he is entitled to recover upon the law as it stood when his right of action accrued, and the defendant must have a stay of execution until he has a reasonable time to resort over to his bond for his indemnity.

† 2 R. S. 436.
ec. 55.

The act of the 28th of *March*, 1809,† which made these bonds assignable, did not affect the former decision, though it wisely provided a more prompt and desirable remedy for the creditor. It was probably passed in consequence of that decision; for the provisions in the 2d and 3d sections are evidently in affirmance of it. The case of *Tillman v. Lansing* must, therefore, apply and govern in other cases not coming within the purview of the act of the 5th *April*, 1810. If the court gave the true exposition of the act of 1801, that exposition must prevail until it ceases to operate by means of the new statute provision.

I have thus endeavored to take a full view of every principle that might affect this case, and my opinion is, that the motion for a new trial ought to be denied.

VAN NESS, J., declared himself to be of the same opinion.

Motion denied.

***GARDERE against THE COLUMBIAN INSURANCE COMPANY.**

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THIS was an action on an open policy of insurance, dated the 19th of *November*, 1807, upon cargo on board of the brig *Eliza*, at and from *Martinico* to *New-York*. The policy contained the following printed clause: "In case of any loss or misfortune, it shall be lawful and necessary for the assured, his factors, servants and assigns, to sue for, labor and travel, in and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance, to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured."

There was also, at the bottom of the policy, the following written clause: "*Warranted American property*, and in case of capture or detention not to abandon, if the property is acquitted or released, in six months after advice is received here, and notice thereof given to the said company."

The cause was tried at the *New-York* sittings, in *June*, 1810, before Mr. Justice *Yates*.

The vessel, with the goods on board, sailed from *Martinico* the 26th of *October*, 1807, and while on her voyage, was captured, on the same day, by a *British* privateer, and carried into *Nevis*. The cargo was libelled and proceeded against as *French* property; and the master was examined as a witness in the Vice-Admiralty Court of *Antigua*, where he was sent for that purpose. The goods were condemned, on the 25th of *November*, *1807, as prize to the captors, who were ordered to pay the freight and expenses. The cargo was then landed by the master, who took in a freight, and left the island.

An abandonment was made by the plaintiff, on the 11th of *January*, 1808, and a suit brought to recover a total loss on the 1st of *May*, 1808. The plaintiff became a naturalized citizen of the *United States*, in 1793, and the goods condemned were proved to be his property. The sentence of the Vice-Admiralty Court at *Antigua* was produced, which stated, "that three preparatory depositions, taken at the island of *St. Kitt's*, were read, and no claim having been interposed, his worship, the judge, was pleased, after hearing the arguments of his majesty's advocate-general in support of the allegations, to pronounce the said 112 hogsheads of sugar to have belonged,

A sentence of a court of admiralty is sufficient evidence of a condemnation, without showing the previous proceedings; (a) and a copy of the sentence under the seal of the court, signed by the actuary, in the absence of the register, accompanied with a deposition of a witness proving the seal and signature, was held a sufficient authentication. (b) Whether the seal of a court of admiralty is not, of itself, evidence? *quære*.

Where a policy of insurance contained a clause of warranty as neutral property, and also a clause, "that in case of

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loss or misfortune, it shall be lawful and necessary for the assured, his factors, servants, and assigns, to sue for, labor and travel, in and about the defence, safeguard and recovery of the property," &c. it was held, that in case of capture, the assured or their agents were not bound to put in

a claim or appeal; and though the property was condemned because no claim was interposed, yet the assured were entitled to recover; for the assured has a right to abandon immediately on advice of the capture; and after an abandonment rightfully made, the master becomes the agent or servant of the insurers, and is answerable to them for his misconduct or neglect. (c)

(a) *Acc. Marine Ins. Co. v. Hodgson*, 6 Cranch, 206.

(b) *Vid. Packard v. Hill*, 7 Cowen, 434. *Yeaton v. Fry*, 5 Cranch, 335. acc.

(c) *Jumel v. Marine Ins. Co. supra*, 412. *Francis v. Ocean Ins. Co.* 6 Cowen, 404. S. C. 2 *Wendell*, 64.

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at the time of capture, to enemies of the crown of *Great Britain*, and as such, or otherwise, subject and liable to confiscation, and condemned the same as good and lawful prize," &c. The decree was certified and attested by *Thomas Thomas*, actuary, in the absence of *Fountain Elwin*, deputy registrar in admiralty. To the sentence was annexed a deposition, taken in *New-York*, proving the seal affixed to the sentence to be the seal of the Vice-Admiralty Court, and also proving the signature and official character of the person signing and certifying the decree.

The counsel for the defendants objected to the reading these papers in evidence, because a record of the whole of the proceedings of the Admiralty Court was not produced, and because the sentence was not authenticated by the signature of the judge of the court; but the objection was overruled. A motion was then made for a nonsuit, but it was also overruled by the judge, who directed the jury to find a verdict for a total loss, and the jury found a verdict accordingly for 10,579 dollars and 40 cents.

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*A motion was made to set aside the verdict, and for a new trial.

C. I. Bogert, for the defendants. 1. The whole of the proceedings in the Vice-Admiralty Court ought to have been produced. They are matter of record; and where a record is produced in evidence, it should be the whole. (*Gilb. Law of Ev.* 16. *Peake, Ev.* 26.) The sentence, accompanied with the proceedings, is the evidence whether there has been a compliance with the warranty or not. (*Marsh.* 714.) It is important, that the whole proceedings should be produced; for it appears, from the sentence, that the master was examined in *preparatorio*, and it may be that the vessel was condemned on his evidence.

2. Another objection is, that the record produced was not properly authenticated, so as to render it admissible. It was not signed by the judge of the court, nor the register or deputy register. (*3 East*, 221.)

3. The condemnation was caused by the negligence or misconduct of the master; and the owners take the risk of the master's ignorance, negligence, or misconduct. No fault short of *barratry* can make the insurers liable. (*Vos & Graves v. Unit. Ins. Co.* 2 *Johns. Cas.* 167. *Kent, J. Vandenhoeck v. Unit. Ins. Co.* 2 *Johns. Cas.* 151. 154. *Benson, J.*) The policy enjoins it on the insured and his agents to do every thing in their power for the preservation and safeguard of the property. Our policy is different from the *English* policies. It says, "It shall be lawful and necessary," &c. A neglect of duty, which occasions a condemnation, is the same as if the loss had been produced by an act of the master. (*Galbraith v. Gracil*, *Condy's* edit. *Marsh.* 406. b. in note.) Though
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examined in the Admiralty Court, the master put in no claim in behalf of the owners; and in consequence of this gross negligence, the property was condemned. He was owner of the vessel, and was interested in obtaining a new cargo, by which he might earn a double freight. The master was bound to put in a claim, and to use his exertions to prevent a condemnation. This was so laid down in *Cheviot v. Brooks*, (1 *Johns. Rep.* 364.)

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* *Colden and T. A. Emmet*, contra. There are three modes of proving the proceedings in the admiralty, by an *exemplification*, a *sworn* copy, or an *office* copy. The sentence produced was an *office* copy, signed and certified by a proper officer of the court. It was not necessary to prove the sentence. All persons are bound by the proceedings in an admiralty court, and must take notice of them under the seal of the court. The *seal* of a court acting under the *law of nations* is evidence of itself. (*Peake's Law of Ev.* 74. 3d edit. 73. and note. 2 *Lord Raym.* 893.)

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There is a distinction between the evidence of the proceedings of a civil or municipal court of a foreign country, and those of a court acting under the law of nations. Though proof of the seal of the former may be required, that of the latter is always considered as evidence without further proof. (8 *East*, 221. 3 *Johns. Rep.* 310.)

But it is said, that all the proceedings of the court should have accompanied the sentence.

KENT, Ch. J. You need not argue that point.

Then there is no legal evidence that the master did not put in a claim. The sentence is evidence only of the fact of a condemnation as good and lawful prize. If the condemnation was sufficient to enable the plaintiff to bring his action within six months, it was all that was requisite. But we contend that the master is not bound to put in a claim. The introduction of the words, *it shall be lawful and necessary* for the assured, &c. in the policy, instead of the words, "it shall be lawful," does not vary the meaning or effect of the whole clause taken together. The insured, immediately upon receiving intelligence of a capture, may abandon: he is not bound to make any claim or appeal to the courts of admiralty, or to litigate the validity of the capture, but may leave that to the underwriters. (*Marsh.* 564. 2 *Burr.* 696. 3 *Term Rep.* 479.) After the abandonment, the master becomes the agent or servant of the insurer; and if the insurer sustains any injury, in consequence of his neglect, he may bring his action against the agent. The point decided in the case of *Cheviot v. Brooks* is in favor of the plaintiff. The observation, that the master ought to have interposed a claim, is merely an *obiter dictum* of the

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judge The plaintiff claims a loss by capture, not by the fault of the master. If the subsequent conduct of the master is such as to amount to barratry, it does not follow that the plaintiff may not recover on the first ground, as it was a valid cause of abandonment. But the property was not condemned solely on the ground that no claim was interposed, but on the examinations taken in *preparatorio*. The captors were bound to show, by the answers to the standing interrogatories, that they had a right. (*Home's Compendium of Statutes, &c.* 35. 39. 47.) How does it appear that the master was guilty of any negligence? He may have been in prison, or sick. The vessel was carried into *Nevis*, and the proceedings were in the Admiralty Court at *Antigua*.

S. Jones, junior, in reply. Examinations in *preparatorio* are merely for the purpose of enabling the captors to decide whether they will file a libel or not. If a libel is filed, and no claim is put in, a condemnation follows of course. Sufficient appears in this case to show that no claim was interposed. I contend that the master is bound to put in a claim; by his neglecting to do so, the plaintiff has acquired the right to abandon in this case. The property was warranted *American*, and if a claim had been interposed, the condemnation would not have taken place. The master may not have been guilty of intentional fraud; but his conduct was grossly negligent. In *Cheviot v. Brooks*, which was an action brought by the principal against the agent, the court said, that a master was bound to put in a claim; but as in that case he acted *bona fide*, he was not answerable to his principal. Here a third person, the insurer, is to be affected by the negligence of the master, and the principal ought to be responsible.

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*YATES, J., delivered the opinion of the court. It was not necessary to produce all the proceedings of the Court of Admiralty previous to the decree. Sufficient appeared by it to answer the legal purposes of the plaintiff. His object was to show that the sugar had been condemned; and that fact is fully established by the sentence. If there could possibly exist a doubt, as to the sentence of condemnation, by omissions or ambiguity appearing on the face of the record, it might be proper to require such proof. This could not exist here. The decree read in evidence explicitly states the fact material to be proved by the plaintiff. The case of *Jones v. Randall*, (*Coup.* 17.) shows that such proof is sufficient, unaccompanied with the previous proceedings. That was an action upon a wager, whether a decree in the Court of Chancery would be reversed on an appeal to the House of Lords; and upon a rule to show cause why there should not be a new trial, among the objections stated by the defendants, one was, that the previous proceedings in the House of Lords ought to have been shown,
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whereas the decree only was produced ; and the court decided, that proof of the decree and of its reversal was sufficient, without such previous proceedings.

The sentence of the Court of Vice-Admiralty at *Antigua*, given in evidence, was sufficiently established by the deposition annexed to it, stating that the seal affixed thereto was the seal of the court, and also proving the signature and official character of the person whose name was subscribed. It is, therefore, unnecessary to notice the distinction urged in the argument, between foreign *municipal* tribunals and courts of admiralty. There was a sufficient authentication, in this case, to receive the proceedings of the Court of Admiralty in evidence, although not signed by the judge. (*Peake's Evid.* 48.) Their decree, in this instance, was, consequently, properly admitted ; and the condemnation was fully proved. The condemnation gave the plaintiff a right of action, and there *is no force in the objection, that no such right existed when this suit was commenced. The action might be brought, without violating the clause in the policy, that "in case of capture or detention, the insured were not to abandon, if the property is acquitted or released, in six months after advice is received and notice thereof given to the company."

Another objection relied on, in the argument, was founded on the alteration in the language of the policy, by the insertion of the word *necessary* in the clause, which now is, "that in case of any loss or misfortune, it shall be lawful and *necessary* for the assured, his factors, servants and assigns, to sue for, labor and travel in and about the defence, safeguard and recovery of the property," &c.

Previous to this alteration, the construction of the above clause was well understood ; and I can discover no substantial reason why the insertion of the word *necessary* should so essentially alter the construction, as to create a different operation. It imposes no additional duties on the master. He was before bound to labor diligently for the recovery of the property, and to alleviate the burdens of the insurer. This is a well settled rule ; yet it is equally well established, by the law of insurance, that this does not affect the right of abandonment. The case of *Tyson v. Guernsey* (3 Term Rep. 477.) is in point ; that if a ship be taken and condemned as prize, the assured might call on the insurer, without being under the previous necessity of appealing, or even making a claim. By abandoning and calling on the insurers, the assured yields up to them all his right, title and interest in the subject insured, and it operates, in judgment of law, as a transfer of the property ; and the captain, from that time, becomes the agent of the insurers. This doctrine has been frequently recognized by this court. (2 *Caines's Rep.* 284. 5 *Johns. Rep.* 324.) The captain, consequently, is answerable to the insurers for his default, if any exists. The assured is not obliged *to put in a claim ; nor

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can the clause warranting it to be neutral property create this duty. The judgment of the Court of Admiralty was not grounded on a want of claim, but on proofs, and as being enemy's property. But admitting the neglect to claim the goods was *barratry*, in the captain, the loss is still by capture and condemnation. And if even the plaintiff had a right to recovery on the *barratry*, that cannot divest him of his right to recover on an event which has happened, and against which he was insured. If the condemnation is illegal, the remedy must be sought by the underwriters, and they may appeal. A contrary construction on those clauses in the policy would make the putting in the claim, &c. a condition precedent, and necessarily introduce principles, in relation to the rights of the assured, materially different from what are now allowed to be the law on the subject.

Besides, if the captain's neglect in not putting in a claim created a sufficient defence in the suit, (and that could only be on the ground that he still continued the agent of the assured, and that the loss proceeded immediately from him, which cannot be the case here,) yet the fact ought to have been affirmatively proved by the defendant, and not left to inferences drawn from the language of the sentence of condemnation; when, for aught that appears, the captain may have put in a claim which might have been adjudged insufficient. Although the sentence is conclusive evidence of the condemnation, it is not evidence of such neglect. It would be a dangerous principle, that a fact within the power of the defendants to prove directly, should, when thus collaterally introduced, be allowed to defeat the recovery of the plaintiff. We are, therefore, of opinion, that the plaintiff is entitled to his judgment.

Judgment for the plaintiff.

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*RILEY against DELAFIELD.

A. sold a vessel to B., in whose name she was registered; but it was agreed between them, that A. should have the whole benefit of the freight to arise from a voyage, for which A.

THIS was an action on a policy of insurance. Plea, *non assumpsit*, and the statute of limitations.

The cause was tried at the New-York sittings, the 13th June, 1810. The policy was dated the 29th of September, 1801, and purported that "James Seton, on account of James Cummings, as well in his own name, as for and in the name and names of all and every other person or persons, to whom

had previously chartered the vessel, and on which she was about to sail. B. insured the vessel as owner for the voyage, and A. procured insurance to be made on the freight of goods on board of the same vessel, for the same voyage; but the agreement between A. and B., or the peculiar nature of A.'s interest, was not communicated to the insurer. It was held, that A. had not an insurable interest, or such an interest as could be insured under the name of freight, without disclosing and specifying its peculiar nature.

the same doth, may or shall appertain, in part or in whole," made insurance, &c. "at and from *New-York* to the port of discharge in the *Mediterranean*, with liberty to stop at *Minorca* or *Malta*, upon the freight of goods laden, or to be laden, on board of the brig *Delia*, *Sprague*, master. The risk to continue until the goods should be safely landed, at her port of discharge in the *Mediterranean*, with the liberty aforesaid," valued at 6,000 dollars.

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The declaration averred, that the plaintiff, at the time of making the insurance, was and continued to be interested in the premises, and that the insurance was made on his account and risk.

As the cause was decided on a single point, it is unnecessary to state the facts or arguments, which relate to the other questions raised in the cause.

The vessel sailed on the voyage insured the 27th of *September*, 1801, and arrived at *Malta* the 21st of *November*, 1801, where she remained until the 9th of *December*, 1801, and sold part of her cargo. She sailed from thence to *Naples*, and arrived in the roads of *Naples* the 17th of *December*, 1801, and on the same day was driven on shore, in a storm, and totally lost, only 180 bags of pepper, part of the cargo, being saved.

Before the date of the policy, and before she sailed on *the voyage, the plaintiff sold the brig to *Howell*, who caused her to be insured, as owner; but the plaintiff having previously chartered her to *Isaac Kibbe*, for the voyage insured, it was agreed, at the time of sale, between the plaintiff and *Howell*, that the plaintiff should have the whole benefit of the freight arising from that voyage, which was the one insured. The vessel was registered in the name of *Howell*, who testified that he had no interest or concern in the *freight* for that voyage. The bill of lading was produced, which stated that the goods were shipped by *Isaac Kibbe*, to be delivered at *Venice*, to the consignee there.

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On the 12th of *October*, 1801, the plaintiff assigned the freight and policy to *James Cummings*, as collateral security against a certain endorsement, made by *Cummings*, of the note of the plaintiff; the assignment was to be void, if the plaintiff paid the note, or indemnified *Cummings*. The note was not paid, and the assignment became absolute; but *Cummings*, who was a witness at the trial, declared that he had no interest in the cause.

It appeared that the plaintiff afterwards became a bankrupt, and his estate was regularly assigned on the 3d of *February*, 1803.

An abandonment was proved to have been duly made to the defendants, on the 8th of *May*, 1802, and the preliminary proofs were exhibited on the 23d of *March*, 1808.

It did not appear that the agreement between the plaintiff and *Howell*, as to the freight, or the particular nature of the

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plaintiff's interest, was communicated to the defendant, previous to his signing the policy.

Several objections to the plaintiff's right of recovery were raised at the trial, which were overruled by the judge; and a verdict was taken, subject to the opinion of the court, on the points so overruled. A motion was made to set aside the verdict, and for a new trial.

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**Pendleton* and *Harison*, for the defendant, contended that the plaintiff had no insurable interest. Though *freight* is distinctly insurable, yet no person can insure *freight* generally, *eo nomine*, unless he be the owner of the ship. *Freight* is incident to the vessel, and unless otherwise declared, the insurer has a right to presume that the person who applies to insure the freight is the owner of the vessel, and interested to preserve and take care of the subject insured. At most, the plaintiff could be no more than an owner *pro hac vice*, and entitled to freight under a charter or contract; and such an interest must be specified or disclosed. (2 *Johns. Rep.* 346.) Unless the peculiar nature of such interest is stated to the insurers, great frauds may be practised, by having a double insurance of the same subject; for *Howell*, as owner of the vessel, might have insured the freight, and would have recovered, in case of loss, on proving that there were goods on board.

But, admitting that the plaintiff had an interest, it was transferred first to *Cummings*, and afterwards to the assignees. *Cummings* declared he had no interest in the freight, and so no action could be brought in the plaintiff's name, for his benefit. When the interest of *Cummings* ceased, it passed to the assignees of the plaintiff, under the general assignment of his property. It was enough, in the first instance, to show the bankruptcy of the plaintiff and the assignment. If the plaintiff afterwards acquired the property, it was incumbent on him to prove it.

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Colden and *T. A. Emmet*, contra, insisted that the plaintiff had shown a sufficient insurable interest. It is not necessary to prove a legal interest; an equitable interest may be insured. There was a charter-party to *Kibbe* existing at the time. The plaintiff had as much of an insurable interest as *Howell*. (4 *Dallas*, 859.) The owner of a vessel may insure his interest generally, though there is a bottomry bond on the vessel; and the holder of the bottomry may also insure, *eo nomine*. (1 *Johns. Rep.* 385.) In *Cheriot v. Barker*, (2 *Johns. Rep.* 346.) it was held, that the person hiring the vessel for the voyage cannot insure the *freight*, because he is to pay the freight, not to receive it. *Howell* could not insure it, for he was not, by his contract with the plaintiff, entitled to the freight. It is true, a peculiar interest, like that of *bottomry*, must be specified; but

if the plaintiff could not insure his interest, under the name of *freight*, we know not by what name or description it could be insured. He was the only person entitled to receive the freight, and it has no other name or denomination.

The question is not, whether the plaintiff has, at this time, an interest, but whether he had an insurable interest at the time the policy was executed. In the eye of the law, the plaintiff must be regarded as having the right to the freight. It is not for the court to inquire who is the person ultimately to receive the money. It is enough that the plaintiff had an insurable interest at the time of the policy. The assignment to *Cummings* was by way of security; and if considered as a mortgage, yet the mortgagor has an insurable interest. (2 *Term Rep.* 187.) Several persons may insure and sue, in regard to the same subject, according to their respective interests. The averment in the declaration, as to interest, has reference only to the time of making the policy. The plaintiff is not bound to prove a continuance of interest down to the time of loss, or bringing the action. (*Marshall*, 683. 2 *Bos. & Pull.* 155. *note.*) The assignment under the bankrupt law was made three years after the loss happened. We could have shown, if it had been necessary, that the assignees had sold and transferred all their interest in this policy to the plaintiff. A suit could not have been brought in the name of the assignees. If neither the assignees, nor any other person but the plaintiff, had an interest, then the suit must be in his name; and we could have proved, that no other person had an interest in the freight.

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Per Curiam. There were several objections raised upon the argument against the right of recovery in this case. It will be sufficient to notice only the first objection, that the plaintiff has not shown an insurable interest.

The policy was generally "upon the freight of goods laden on board the brig *Delia*," and the plaintiff was not owner of the vessel, he having, some time before the insurance was effected or the voyage begun, sold her to *Howell*, who caused the vessel to be insured for the voyage. *Howell* states, that he had nothing to do with the freight for this voyage, as the plaintiff, according to an agreement made at the time of the sale, was to have the benefit of that freight. All the interest of the plaintiff was, then, founded upon this special agreement, and it could not strictly or technically be denominated freight, since it was not an interest accruing to the plaintiff, as owner of the vessel for the use of her. It was an interest founded entirely upon the agreement, and could not have been claimed or recovered under any other title. It could not be insured as freight, *eo nomine*, unless accompanied with a disclosure of the peculiar nature of the interest. It would otherwise be an imposition upon the insurer, who, when he is asked to insure freight, must presume that he is dealing with the owner of the vessel. The

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owner has a stronger interest in the equipment and management of the vessel than a stranger, having no such stake in the voyage. And to allow such an interest to be covered, under the name of freight, without explanation, would lead to abuse and fraud, by affording an opportunity to cumulative insurances upon the same interest, and interested combinations to destroy it. In *Cheriot v. Barker*, (2 Johns. Rep. 346.) the court intimate *and approve of this principle, that a concealed particular interest, contrary to usage, ought to be disclosed. This case is brought fully within the reach of that doctrine. The contract ought to contain, within itself, the identity and certainty of the subject matter, so that the parties may understand the engagement with precision, and calculate accordingly.

Judgment ought, therefore, to be rendered for the defendant.

GUERLAIN *against* THE COLUMBIAN INSURANCE COMPANY.

Insurance on a cargo from New-York to Charleston, on goods specified in the margin of the policy, to the amount of 1,310 dolls. The policy contained the following written clause; "The assurers by this policy take no other risk than general average, and such total loss only as may arise by the absolute de-

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struction of the property." The vessel was stranded, the day after she sailed, and part of the goods were unladen, and stored at *Barnegat*, and the residue put on board of a lighter, which was detained from sailing by the ice; and before the goods stored on shore were sold, and while the lighter was detained, a part of the goods were stolen or lost. Part of the cargo insured consisted of *beef, butter, candles, soap, apples and potatoes*, and the rest of iron and hardware. The invoice cost of the articles insured was 1,194 dollars, and the amount of articles stolen or lost was 332 dollars. It was held that the policy was upon so much of the cargo, as an integral subject, and that the assured could not recover for each article totally lost, there being neither a general average, nor a total destruction of the subject insured. (a)

THIS was an action on a policy of insurance on the cargo of the schooner *Two Brothers*, from New-York to Charleston, South Carolina.

The cause was tried at the New-York sittings in April, 1810.

The insurance was declared by the policy, to be upon the goods specified in the margin, (being *beef, butter, soap, candles, apples and potatoes*.) and whereon 1,310 dollars were insured.

The policy also contained the following written clause: "The assurers by this policy take no other risk than general average, and such total loss only as may arise by the absolute destruction of the property." The cargo consisted of iron, hardware, looking glasses, beef, butter, soap, candles, and various other articles.

*The vessel sailed from New-York the 31st of December, 1806. On the 1st of January, 1807, she was stranded in a gale of wind, on *Barnegat Shoals*, near *Sandy-Hook*, and on that day, and during the four following days, the cargo was unladen and stored at *Barnegat*, except the iron, and two casks, and a box containing looking glasses, &c., which were put on board a sloop to be brought back to New-York; the schooner was

(a) Acc. *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415. *Moreau v. United States Ins. Co.* 1 Wheat. 519. *Wadsworth v. Pacific Ins. Co.* 4 Wendell, 33.

afterwards wrecked and lost. Part of the cargo, consisting of beef, butter, candles, soap, apples and potatoes, was sold at *Barnegat*, at public auction, on the 13th of *February*, 1807, and the residue of the beef, butter, potatoes, apples, &c., was lost or stolen.

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The sloop on board of which the two casks and boxes of hardware were put, was frozen up at *Barnegat*, and lay there until *April*, when she came up to *New-York*. Part of the iron and of the other articles was stolen.

It appeared that the invoice cost of the whole articles insured was 1,184 dollars and 48 cents, and the cost of the articles lost or stolen at *Barnegat* amounted to 332 dollars and 98 cents.

The whole cost to the assured of the beef, butter, soap, candles, apples and potatoes, covered by the policy, was 641 dollars and 12 cents, and the amount of the sales of those articles at *Barnegat*, was 424 dollars and 29 cents. There was an abandonment for a total loss.

S. Jones, jun. and *C. I. Bogert*, for the defendants, contended that the insurers, under the written clause, were not liable, except for a physical total loss, or for general average. That the clause was expressly introduced for the purpose of guarding against all liability for a *technical* total loss, or particular average on the articles insured. It was neither a physical total loss, *or absolute destruction of the whole subject, nor a general average.

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Woods and *Hopkins*, contra, insisted, that by the enumeration in the margin of the policy, it was intended that the insurers should be liable for each article lost; and whether this loss was occasioned by sinking, or by theft, or in any other way, it could make no difference.

Per Curiam. The defendants are entitled to judgment. There was neither a case of general average, nor an absolute destruction of the property, and in no other event were the defendants to be responsible. The idea that for each *item* or article of the cargo which was totally lost, the defendants are liable, is not well founded. The insurance was upon so much cargo as an integral subject. In the *French* policies at *Marseilles*, certain perishable articles are declared free of average, general and particular, which means that the underwriter is answerable only for an entire loss of the subject insured. And, therefore, where part of a cargo of wheat has been thrown overboard, in a case of extremity, the insurer has repeatedly been held not to be responsible. (1 *Emerig. c. 12. s. 45.*)

Judgment for the defendants.

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KILMORE
v.
SUDAM.

KILMORE against SUDAM.

IN ERROR, on *certiorari* from a justice's court.

The right of
a justice to ad-

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join a cause on
his own motion
must be claimed
and exercised at
the return of the
process; and if
the first adjourn-
ment is made
by consent of
parties, the jus-
tice cannot ad-
journ the cause
a second time;
on his own mo-
tion; but the
plaintiff having
consented to a
second adjourn-
ment, and the
defendant mak-
ing no objec-
tion, the ad-
journment was
held to have
been made by
consent of both
parties. (a)

Sudam sued *Kilmore* in the court below, in an action on the case, for 8 dollars, on account, as a physician. The *defendant pleaded the general issue. The parties, by agreement, adjourned the cause until the 6th of *November*, at which time *Sudam* appeared in person, and *A. L. Jordan* appeared, under a power of attorney, for *Kilmore*. The justice stated that it being made satisfactorily to appear to him that *Kilmore* was out of the county, he permitted the attorney to appear; but as he entertained doubts as to the *bona fide* absence of *Kilmore*, he did, with the consent of the plaintiff, adjourn the cause to the 10th of *November*. No objection was made by the defendant's attorney. At that day, the attorney again offered to appear; but neither *Kilmore's* absence nor the attorney's power being proved, the justice refused to admit him, and proceeded to hear the plaintiff's evidence, and gave judgment for the plaintiff.

Parker, for the plaintiff in error.

E. Williams, contra.

Per Curiam. The right of the justice to adjourn a cause on his own motion, must be claimed and exercised, if at all, *at the return of the process*; and if the first adjournment is by consent of parties, no subsequent adjournment can be made on the motion of the justice. This is obviously the fair interpretation of the statute; and so it seems to have been understood by the court in the case of *Gamage v. Law*, (2 *Johns. Rep.* 192.) But it is no more than a reasonable intendment in favor of the proceedings, that the second adjournment was by the consent of the defendant's attorney. The justice states expressly, that it was with the consent of the plaintiff, and the defendant's attorney being present and making no objection, his consent is to be inferred from his silence. Had the justice claimed the right to adjourn on his own motion, he probably would have said nothing on the subject of consent. In *M. Neil v. Scofield*, (3 *Johns. *Rep.* 437.) the court said, where the party makes no objection to the pleadings at the time, but consents to go to trial, he shall not avail himself of any defects in the form of pleading.

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Judgment affirmed.

(a) Vid. *Dunham v. Heyden*, *supra*, 331. note a. *Payne v. Wheeler*, 15 *Johns. R.* 452. *Proudfit v. Henman*, 8 *Johns. R.* 391.

ALBANY,
Feb. 1811.JACKSON
v.
CORLISS.JACKSON, *ex dem.* SCHUYLER, *against* CORLISS.

THIS was an action of ejectment for lands in lot No. 33, in the *Saratoga* patent. The cause was tried at the *Washington* circuit, in *June*, 1810, before Mr. Justice *Van Ness*.

A lease was proved, dated the 8th *December*, 1795, by which *Philip Schuyler*, under whom the lessor of the plaintiff claimed, demised the premises to *Oliver Warren*, for 21 years, from the 1st *January*, 1796. The lease contained a reservation, covenant and proviso, as follows: "And the said lessor, for himself, doth also save and reserve the one equal fourth part of all moneys arising, or that may arise, by, or from the selling, renting, setting over or assigning, or any how disposing of the premises hereby leased, or any part or parcel thereof, by the said lessee, his heirs, executors, administrators and assigns, and when, and as often, and every time, the same shall be sold, rented, set over, assigned, or otherwise disposed of; and the said lessee, for himself, &c., doth also covenant, promise, &c., that whenever he or they shall incline, or be by law, or otherwise obliged to sell, rent, set over, assign, or otherwise to *dispose of his, or their interest in the premises, or in any part or parcel thereof, that then, and in that case, he or they, or some or one of them, shall make the first offer thereof unto the lessor, his heirs, &c., notifying and declaring in writing what he or they will take for the same; and if the said lessor, his heirs, &c., do not take it at the price required for the same, after deducting therefrom the one equal fourth part, as above reserved, together with any arrears of rent, which may be then due, that then he or they shall, within twenty-one days from the time of such notice being actually so given, and on the further application of the said lessee, his heirs, &c., grant a permit to him or them, to sell, assign, or rent their interest in the premises. *Provided always*, that every sale, renting, or otherwise disposing of the premises, or any part or parcel thereof, shall be void, and to all intents and purposes of no effect, and the premises revert to the lessor, his heirs, &c., such permit, or any thing therein contained notwithstanding, unless the seller or purchaser shall well and truly pay unto the lessor, his heirs, &c., the one equal fourth part of the money it shall so be offered for, as aforesaid." The plaintiff proved that the defendant held the premises by purchase under the lease. It was then shown that the defendant came into possession by a purchase made at public auction, under an execution issued on a judgment in this court, confessed by *John Corliss*, the father of the defendant, in favor of the defendant, for 5,500

A lessor reserved one quarter of the money arising from every letting, assigning or disposing of the premises by the lessee, who covenanted, that whenever he should incline, or be by law, or otherwise, obliged to sell, &c., he would make the first offer to the lessor, giving him notice of the price, &c., and it was provided that eve-

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ry sale, renting, &c., should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor, the one fourth of the money offered, &c. The tenant holding under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff. This was held not to be a breach of the covenant or condition in the lease; the judgment not having been confessed fraudulently, or for the purpose of enabling the creditor to take the lease and execution under the judgment, and with a view to defeat the lessor's right to the

one fourth of the money offered, under the covenant. (a)

(a) See *Jackson v. Silvernail*, 15 Johns. R. 272. And see *Jackson v. Groat*, 7 Coten, 285.

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dollars debt, and 13 dollars and 7 cents costs, signed the 2d *October*, 1805. Exemplifications of the judgment and execution were produced. The sheriff was directed to levy 2,500 dollars of debt, and 16 dollars costs; and the sheriff returned on the *feri facias*, that he had made the sum of 1,483 dollars and that for the residue of the debt, the defendant in this cause accepted the note of the defendant in the execution, in full satisfaction thereof: And it was proved that *John Corliss* *was discharged under the insolvent act, the 8th *March*, 1806, and the present defendant was a petitioning creditor, and made oath, on the 30th *December*, 1805, that the insolvent owed him 1,086 dollars and 40 cents; another son of the insolvent was a petitioning creditor for 1,175 dollars, and his son-in-law was also a petitioning creditor for 1,280 dollars.

The plaintiff then produced witnesses, in order to prove that the judgment was confessed by *John Corliss* fraudulently, and for the purposes of defeating the covenant and condition in the lease. After the evidence on both sides was closed, the judge, after stating or commenting on the evidence, directed the jury that they must find a verdict for the plaintiff, subject to the opinion of the court as to the construction of the covenant for quarter sales; and the only question of fact for the jury to determine was, whether the judgment confessed by *John Corliss* was fraudulent or not; and that they must, in delivering their verdict, say it was fraudulent, or not, as they found the fact to be. The jury found a verdict for the plaintiff for 6 cents damages, subject to the opinion of the court, as to the construction of the covenant; and they also found that the judgment confessed by *John Corliss* was not fraudulent.

A motion was made to set aside the verdict, and for a new trial.

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Wendell, for the plaintiff, contended that the covenant not to assign without the permission of the lessor, was legal and proper. (*Woodfall*, 314. 340. 2 *Term Rep.* 134. 137.) Admitting that the defendant came into possession, under the sale, and that the judgment was not fraudulent, still the lease was forfeited; for the confession of the judgment was a voluntary act, and only another mode of transferring or disposing of the property. In *Doe v. Carter*, (8 *Term Rep.* 300.) where the jury found the fact that the warrant to confess judgment was given for the purpose of disposing of the property; *it was held to be in fraud of the covenant, and the lessor might reënter, under the clause of reëntry, for breach of the condition, and might recover the premises in ejectment, from a purchaser at a sheriff's sale. The same doctrine was laid down in *Doe v. Hawke*, (2 *East*, 481.) But whether the confession was voluntary or not, the tenant was bound to give notice to the landlord; and there being no notice in this case, there was a breach of the condition, by which the lease became forfeited

Z. R. Shepherd, contra, contended that the construction of the lease ought to be strict, so as to prevent a forfeiture. (*Cowp.* 243. 247. *Woodfall*, 203.) The defendant did not sell the premises, nor was there any offer made to him to purchase; and the landlord is entitled only to a fourth part of the money offered to be paid. No notice of an offer could be made; for no offer existed. The sale under the execution is a sale by act of law, not by the party. It is a compulsory sale.

The covenant is void, for it can never be performed; it is against public policy, and ought not to be supported.

Per Curiam. A sale of the premises under a judgment confessed by the defendant was no forfeiture of the lease, under the covenant and proviso stated in the case, unless the judgment was fraudulently confessed, with a view to defeat the lessor's reservation of one fourth of the money offered. The jury have decided the question of fraud in favor of the defendant. The covenant only applied to voluntary sales, by the lessee. The case of *Doe*, ex dem. *Mitchinsen*, v. *Carter* (8 *Term Rep.* 57.) is in point. The subsequent decision on that case (8 *Term Rep.* 300.) was founded expressly on the fact of fraud in confessing a judgment, for the purpose of enabling the creditor to possess the lease. There must be judgment for the defendant.

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CARTER
v.
SIMPSON

*CARTER against SIMPSON,

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IN ERROR, on *certiorari* from a justice's court.

The return stated that *Simpson* sued *Carter* before the justice, and declared for damage done to his hay, by the cattle of the defendant, which the defendant turned into the field where the hay was stacked, and in pulling down and carrying away the fence around the stack, &c.

The defendant pleaded not guilty; and the cause was tried by a jury. The plaintiff offered to prove his property in the hay, standing in a stack on the ground of the defendant, by purchase at auction, at a constable's sale, on an execution against one *Jarvis*. The defendant objected to the testimony, without the production of the *execution and judgment* by virtue of which the sale was made. The objection was overruled, and the plaintiff proved the sale by parol evidence. The defendant then offered to prove that the execution had expired, and that, at the time of the sale, the plaintiff in the execution directed the constable to have it renewed. This evidence was

A. brought an action of trespass against B. for destroying a stack of hay belonging to the plaintiff. The plaintiff proved that he bought the hay, which was on the land of B., at a constable's sale, at public auction. It was held that the plaintiff was bound to prove property in the hay, and that proving a purchase at a constable's auction was not enough, without showing the authority under which the constable

acted; for a sale by the officer without authority would not give a title to the purchaser.

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v.
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overruled; and the plaintiff proved that the constable offered the hay and all the rest of the personal property of *Jarvis*, for sale, and that it was all struck off together, to the plaintiff. The jury found a verdict for the plaintiff, on which judgment was rendered by the justice.

Wendell, for the plaintiff in error. He cited 2 *Johns. Rep.* 46. 48. 6 *Johns. Rep.* 169.

Skinner, contra. He cited 2 *Caines*, 263.

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Per Curiam. As the plaintiff below never had possession of the hay, which was on the defendant's ground at the time of the alleged injury, he was bound, at least, to show a right of property. The proof of a purchase at auction, at a constable's sale, without showing the authority *under which the constable acted, was not enough. If the constable had no authority to sell the hay, the vendee had no title. The books have gone so far as to say, that a vendee under a lawful judgment and execution, shall not lose his property, upon a reversal of the judgment by writ of error. This was so ruled in *Manning's* case, (8 *Co.* 96. b.) But no case admits a title in the purchaser, when the sheriff acted without authority. On this ground the judgment below must be reversed.

HALL against BALLENTINE.

Where a tenant wilfully holds over, after the expiration of the term, and a notice to quit, the landlord is entitled to double rent.

THE plaintiff, by indenture, dated 2d *May*, 1808, demised a tenement in the city of *New-York* to the defendant, for one year from the first of *May*, 1808, for the yearly rent of 200 dollars, payable quarterly; and the defendant covenanted quietly to surrender up the premises at the end of the year, in good order, &c. The plaintiff, on the 4th of *March*, 1809, gave the following written notice to the defendant. "Mr. *William Ballentine*, this is to notify you to leave the store and premises now in your possession, by the first day of *May* next ensuing." The defendant did not surrender the premises, but held over.

The only question was, whether the plaintiff was entitled to double rent, during the time the tenant so held over. The case was submitted to the court without argument.

† 1 *R. S.* 745.
sec. 11.

Per Curiam. The statute† gives the double rent for wilfully holding over after the expiration of the term, and the notice to quit; and here the holding over must be considered as wilful. There could be no mistake or pretence of right, nor was

any advanced. In *Wright v. Smith*, (5 *Esp. N. P.* 203.) there was a *bonâ fide* holding over, under a claim of title. Here the act of the tenant *was palpably wilful, and the plaintiff is consequently entitled to judgment. (a)

(a) 3 *Burr.* 1609 5 *Burr.* 2654. 1 *Esp. Cas.* 286. 2 *Black.* 1075. 2 *East*, 310.

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† Vid. *Bradley v. Cowel*, 4 *Cowen*, 349.

WALSH and others *against* SACKRIDER.

THE defendant is an attorney of this court, and the suit was brought against him on a note for a sum above 25 dollars, but less than 50 dollars, and a judgment was given for the plaintiff, on a *cognovit*, for less than 50 dollars.

The question was, whether the defendant was liable to pay supreme costs; and if not, whether the plaintiff was liable to pay costs to the defendant.

Where an attorney of this court is sued, and judgment is recovered for a sum exceeding 25 dollars, but less than 50 dollars, the plaintiff is entitled to full costs. (a)

Per Curiam. Full costs are recoverable against the defendant. The case of *Bailey* (1 *Johns. Cas.* 32.) is in point. The reason is, that the plaintiff could not safely sue the defendant elsewhere, for he would have been entitled to his privilege of this court, and could have abated the suit.

(a) Vid. *Foster v. Garnsey*, 13 *Johns.* 465. *Wood v. Gibson*, 1 *Cowen*, 597.

DIZEN and Wife *against* BATES, late Sheriff, &c.

A JUDGMENT of nonsuit having been entered in this cause, for not declaring,

Sill, for the plaintiff, now moved to set aside the judgment, on the ground of irregularity.

Where the defendant, after an appearance, entered a rule in vacation, to declare before the end of the next term, which was

*Notice of the rule to declare before the end of the then term, was served on the agent of the plaintiff's attorney, on the 24th of *July*, and the plaintiff's attorney swore that he did not receive it in time to declare before the expiration of the rule, and that he did not think a default would be entered before the expiration of forty days, the service being on the agent in vacation. The default was entered on the 29th of *October*, and the judgment of nonsuit on the 16th of *December*.

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served on the agent of the plaintiff's attorney; it was held, that the service of the notice of the rule might be at any time before the term, and if the plaintiff did not declare before the

end of the term, his default might be entered, though forty days had not elapsed from the time of serving the notice on the agent. (a)

(a) But the plaintiff has the whole of the last day of the term in which to declare, and his default cannot be entered until the next day thereafter. *Sharp v. Dorr*, 15 *Johns. R.* 531.

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Rodman, contra.

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Per Curiam. The motion must be denied. The proceedings on the part of the defendant have been regular. The rule is explicit, that the defendant, having duly appeared, may, at any time thereafter, take a rule against the plaintiff to declare before the end of the term next following, after service of the notice of the rule. Where the service of the notice is at any time before the term, the plaintiff is in default, if he does not declare before the end of the term.

Motion denied

Bours against TUCKERMAN.

A person under recognizance to appear at a court of general sessions of the peace, while attending that court, was arrested on a *capias* out of this [* 539] court, and held to bail; and this court ordered him to be discharged, on filing common bail, unless the plaintiff elected to waive the arrest, and take out new process

N. WILLIAMS, for the defendant, moved to discharge the defendant from the arrest, and to set aside the *capias* and proceedings in this cause. He read an affidavit, stating, that on the 9th of *October* last, the defendant was under recognizance to appear at the next General Sessions of the Peace, to be held in *Madison* county, on the first *Tuesday* of *January* last. He appeared at the sessions, and while he was attending, and before he was *discharged from his recognizance, he was arrested by the sheriff of *Madison*, on a *capias ad respondendum*, issued out of this court, at the suit of the plaintiff; and though he claimed to be privileged, in consequence of his attendance at the sessions, the sheriff carried him to his place of residence, where he was admitted to bail, in the sum of 3,200 dollars.

Clark, contra.

Per Curiam. The defendant was privileged from arrest, as it appears that he had no opportunity to apply to the court below to be discharged, and as this court ought not to suffer its process to be executed in violation of the privileges of other courts, the defendant must be discharged from the bail-bond and the arrest, on filing common bail, unless the plaintiff should elect, as he may, to waive the arrest altogether, and issue new process.

Motion granted. (a)

(a) A suitor attending court is not privileged from the service of non-bailable process. If bail is demanded, he will be discharged on common bail, but an absolute discharge is only granted to foreign witnesses. *Hopkins v. Coburn*, 1 *Wendell*, 292. *Sanford v. Chase*, 3 *Cowen*, 381.

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v.
BRADT.THE PEOPLE *against* BRADT.

THE defendant was brought up on an attachment, for non-payment of the costs in several actions of ejectment, in which he was a lessor, at the last *August* term, (6 *Johns. Rep.* 318.) and was then discharged, on his affidavit, that he had no interest in the premises mentioned in the actions of ejectment, and that he had never consented to become a lessor; and the court granted a rule against the attorneys of the plaintiff, to show cause, at the last term, why an attachment should not issue against them, *for the costs. At the last term, the attorneys showed cause by affidavits, which stated that *Bradt* did consent to have his name used as one of the lessors, in the actions of ejectment. The court thereupon directed a new attachment to be issued against *Bradt*, on which he was now brought up, and put to answer interrogatories. He admitted that he was the lessor named, and that he had refused to pay the costs; but denied his consent to have his name used as a lessor, or that he had any interest in the premises.

Where a lessor, in an action of ejectment, was brought up on an attachment, for non-payment of costs, and he denied that he ever consented to have

[* 540] his name used in the action, the court said that they could not receive his denial, in bar of the attachment, nor decide between the contradictory affidavits of the party and his attorney; but the party must pay the costs, and take his remedy over against the attorney who inserted his name as lessor; but they stayed the proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the fact. (a)

Johnson, for the plaintiffs.

N. Williams, for the defendant.

Per Curiam. The court cannot receive the defendant's denial of his consent to have his name used, in the actions of ejectment, as a bar to the process. If the fact be as he states it, he has his remedy over against the attorneys of the plaintiff in those suits. The court cannot judge between the contradictory affidavits of the party and the attorneys. The defendant in those suits must have his costs, and is not to lose them in consequence of the denial of the lessor and his attorneys, of any responsibility.

It is enough for the court that *Bradt* appears as a party to the record; and he confesses enough to show that he is in contempt, and to charge him with the payment of the costs. But as the aggregate of the costs in all the suits is large, the court, after adjudging him in contempt, direct his recognizance to be respited, at his prayer, until the next *August* term; to the end that he may have an opportunity, in the mean time, to bring his action against the attorneys of the plaintiff, on the charge of using his name without his consent, and thereby to bring the truth of that allegation to the test, by a trial of the fact.

Rule granted accordingly.

(a) *Vld. Bradt v. Walton*, 8 *Johns. R.* 298.

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STAFFORD

v.

MAYOR, &c.

OF ALBANY.

*STAFFORD *against* THE MAYOR, ALDERMEN AND
COMMONALTY OF THE CITY OF ALBANY.

The Mayor's Court of Albany, in executing the power granted to them under the act of the 4th of April, 1801, (24th sess. c. 153. s. 13. 21, 22.) as to taking the ground of any person to widen streets, &c. act qua commissioners, and not judicially, as a court. The power must be strictly pursued; and after the court have affirmed an assessment made under the act, they cannot set it aside for any cause, but are bound to pay the money according to the assessment. (a)

No formal record is necessary, in regard to the proceedings under the act; but it seems they may be removed by certiorari, in order to be examined and corrected by this court. (b)

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THIS was an action of *assumpsit*. The declaration and pleas were the same as before stated, in the same case, between the same parties, vol. 6. p. 1. To the plea of *non assumpsit* was subjoined a notice of special matter to be given in evidence at the trial.

The cause was tried at the *Albany* sittings, on the 16th of October, 1810, before the *chief justice*. The plaintiff gave in evidence the 13th and 22d sections of the act to reduce several laws, particularly relating to the city of *Albany*, into one act, &c., passed the 4th of April, 1801. (24th sess. c. 153.) He also gave in evidence a precept or *venire*, issued the 4th of October, 1808, under the seals of the mayor and two of the aldermen, pursuant to the 13th section of the said act, and of "the act to amend the acts concerning the city of *Albany*, passed the 25th of March, 1808, commanding the sheriff to empanel and return a jury, to appear before the Mayor's Court, to assess the damages and recompense due to various persons named in the *venire*, amongst whom was the plaintiff, for so much of their ground, particularly described in the *venire*, as was deemed necessary to be taken, for widening *Lydeus* street, &c.

The plaintiff further gave in evidence the assessment of the jury, by which they assessed the damages of the plaintiff at 815 dollars; also a certified copy of a rule of the court thereupon entered, as follows: "On motion of Mr. *Van Vechten*, attorney for the mayor, &c., Ordered, that the same be confirmed and judgment thereon, according to the act aforesaid." The plaintiff also read in evidence a deposition of a witness, stating that the city surveyor and superintendent had directed the plaintiff *where to place the building on his lot, and the plaintiff erected the building accordingly, so as to leave the ground described in the *venire* and assessed by the jury, in the street; and also the first section of the by-law of the corporation of *Albany*, passed the 6th of June, 1808, prohibiting any person from erecting any building, unless the range of the same with the street was first laid down by the superintendent, under the penalty, &c.

The counsel for the defendants objected to this evidence, as inadmissible and insufficient, but the *chief justice* overruled the objection, and directed the jury that the evidence was competent and sufficient.

(a) Vid. *Matter of Dover Street*, 18 Johns. R. 506. 1 Cowen, 74. *Matter of Beekman Street*, 20 Johns. R. 269. *Matter of Third Street*, 6 Cowen, 571. *Hackins v. Trustees of Rochester*, 1 Wendell, 64. *People v. Corporation of Brooklyn*, Id. 318.

(b) *Bogert v. Mayor, &c. of New-York*, 7 Cowen, 158. *Starr v. Trustees of Rochester*, 6 Wendell, 564.

The defendants' counsel then offered in evidence the acts of the legislature, the *venire* and assessment before-mentioned; and also offered to prove, that at a mayor's court, &c., held the 7th of March, 1809, the *venire* and all the subsequent proceedings were set aside and vacated by order of the said court, for irregularity, before, and without any record of the proceedings or judgment of the said court thereon, having been made up or filed; that the corporation have never tendered or paid the amount of the assessment, and have never claimed or taken possession of the ground described in the plaintiff's declaration, for the purpose of widening *Lydeus* street. The counsel for the plaintiff objected to this evidence, which was overruled by the *chief justice*, as incompetent and inadmissible; and under his direction, the jury found a verdict for the plaintiff, for 930 dollars damages. The counsel for the defendants tendered a bill of exceptions, which was signed by the *chief justice*; and under the late act (32d sess. c. 186. s. 5.)† was returned to this court, to give judgment, or grant a new trial.

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† 2 R. S. 42.
sec. 80.

Henry, for the defendants. The evidence on the part of the plaintiff did not support the declaration. A *judgment of the Mayor's Court on the assessment of the jury, was essential to entitle the plaintiff to recover; for without a judgment, no right could be vested or divested; and it having also been stated in the declaration, it was necessary to show the judgment; but there was no proof of such a judgment. The Mayor's Court is a court of record, and the only legal evidence of a judgment is the record of the court. There must be an enrolment or record of the proceedings, as in any ordinary suit. (*Com. Dig.* 172. *Record*, A. *Co. Litt.* 117. b. 260. a. *Fortesc. Rep.* 385.) The minutes of the clerk are not a record, or competent evidences of a record.

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Again, there is a variance between the *venire* set forth in the declaration and the one produced at the trial. The *venire* formed an essential part of the record; and the slightest variance, as to a record, is fatal in pleading. (*Chitty on Plead.* 303. 305, 306.)

Again, the evidence offered by the defendants, in their defence, ought not to have been rejected. The Mayor's Court had a right to set aside the judgment for irregularity. The power given to the mayor, aldermen and commonalty, was given to them as a court, and they were bound to proceed judicially, and to record their proceedings and pronounce judgment. If they were mere commissioners, then their proceedings might be removed to this court by *certiorari*. How is the party to obtain redress, in case of any illegality in the proceedings? If the inferior court cannot set aside the proceedings for irregularity, they cannot set them aside for fraud. If their powers were at an end, after judgment on the assess-

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ment, they could not interfere, though the grossest fraud had been practised; even though it should be shown that a jury had been *packed* for the purpose of making the assessment.

The plaintiff attempted to prove that the defendants had elected to take the ground, and we offered to prove that they had not made any such election, and this evidence was rejected.

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*Again, there is nothing in the act which makes it compulsory on the defendants to pay the money; no debt or duty accrued in regard to them. The 22d section does not apply to this case, but refers only to the case mentioned in the 21st section, where there are infants, or persons absent. As it respects parties before the court, no right vests in the corporation until the payment of the money, or a refusal. The corporation, after an assessment, may elect to take the ground, or not. The declaration does not state that the corporation took possession of the ground, nor any act, on the part of the plaintiff, to compel the defendants to make an election. The *formal* words, "though often requested," &c., are not sufficient.

Foot, contra. The power given to the Mayor's Court, by the statute, is for a specific purpose; they do not, in executing this power, act as a court in ordinary cases. After giving judgment on the assessment, their power was at an end. There is no need of a record; for there is no necessity for a writ of error. The proceedings may be brought before this court by *certiorari*, and examined and corrected. The corporation ought to be bound by the assessment. It would be unreasonable to allow them to set it aside for the sake of obtaining one more favorable to them. The 13th and 22d sections of the act are all that can be taken notice of, as applicable to the case; and the 22d section is not confined to the case of infants and absentees, but refers to the 13th as well as the 21st section.

SPENCER, J., delivered the opinion of the court. An opinion has been already expressed by the court, on some of the points made on the argument. (6 *Johns. Rep.* 1.) In considering the bill of exceptions, we are confined to the inquiry, whether the evidence rejected ought to have been admitted. The 5th section of the act of *the 32d sess. c. 186.† provides, that when a bill of exceptions is taken on a trial, it shall be returned into this court, where judgment is to be given according to the same exceptions, as they ought to be allowed or disallowed, with power to award a new trial, in our discretion. The evil intended to be remedied was the carrying of causes before the court of *dernier resort*, upon the opinion of a single judge; but according to the new provision, the point ruled at the trial must be concurred in by the court, or a new trial will be awarded.

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† 2 R. S. 423.
sec. 30.

The new law, therefore, is calculated frequently to save the expense of a writ of error, and to secure a decision of the court on the question of evidence.

There having been no motion in arrest of judgment, we might dispense with pronouncing any further opinion on the plaintiff's title, or the objections heretofore raised and urged anew, for our consideration ; but it is possible that our opinion may prevent future litigation.

It has been contended, there being no averment in the plaintiff's declaration that the corporation took possession of the valued premises, that there is no right to recover. We are of opinion that such an averment is unnecessary. There are two sections of the act which apply to this case. (2 *Rev. Laws*, 153. 153. s. 13. and 22.) The 13th section directs the proceedings in making the assessment, and it requires, that before the corporation can appropriate the ground to public use, they must pay or tender to the owner the sum assessed. The 22d section creates the duty on the corporation, by providing, that after the value and damages shall have been ascertained, the amount, with interest, shall be paid to the person interested, on demand. This section of the act extends to all cases where an assessment has been made, as well under the directions of the 13th as of the 21st section. The 21st section merely provides a mode of proceeding somewhat different from that of the 13th section, as to the manner of giving notice to the proprietor of the ground intended to be applied to public use ; and it relates only to such persons as reside without the state, or whose place of residence is unknown. It is admitted, that in the latter case an assessment would create a duty on the corporation, but it is denied, where the proceeding is under the 13th section. We perceive no ground for the distinction ; and, indeed, it would be a most unreasonable construction of the act, to allow the corporation to take their chance of an assessment, and if it did not suit their notions, to treat it as nugatory ; or, in other words, to let them have the land, if assessed low, but not to require them to take it, if assessed high. There would be no reciprocity, if the owner of the ground is bound to abide by the assessment, and the corporation are at liberty to accept it or not ; and it cannot be denied, that should they have the option of taking, or refusing to take the ground, at the assessment, that they may proceed, *toties quoties*, until they get an assessment which they approve.

The proceedings in question do not partake at all of the nature of judicial proceedings. There is nothing to be done by the Mayor's Court but to affirm or disaffirm the assessment. The process to convoke the jury is issued by magistrates out of court, under their hands and seals. The authority under which the Mayor's Court acted, was specifically derived from the legislature, and must be strictly pursued ; when, therefore, the assessment was confirmed, the court had no further powers:

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they were *functus officio*. (11 East, 200, 201, 202.) There is no analogy between this proceeding and the judicial proceedings of a court of record, in the progress of a cause. The power granted by the legislature to the Mayor's Court, in the present instance, may, not unaptly, be compared to the power given to a court of common pleas, to discharge an insolvent from his debts. In both *cases, the court act *qua* commissioners. Should the Court of Common Pleas discharge a person, as an insolvent, can it be pretended they would have a revisionary power, and might annul the discharge? In all that class of cases, where the proceeding is conducted in court, and the judges act as commissioners, their acts, once done, are irreversible by themselves.

The variance between the requisition made by the corporation, and the *venue*, or the description of the land, is cured by the subsequent assent of the corporation, through its attorney, by moving a confirmation of the assessment. In doing that act, they assented to take the land as described in the *venue*. Any irregularity which may have intervened on the assessment, was cured, also, by that act of assent.

The objection to the want of a record has its foundation in considering this proceeding as judicial. If it is not, then there is no force in the objection.

We, therefore, concur in the opinion delivered at the trial, excluding the evidence offered by the defendants.

That the *venue*, under which the jury was summoned, differed from the one produced at the trial, was an objection which should have been taken at the trial, and cannot now be discussed. It may, however, be observed, that, as it was matter of inducement, and as courts have latterly inclined to get over technical objections, there may not be much weight in the objection.

Motion denied.

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*RUDD *against* BAKER.

Where a justice, after having signed a return to a *certiorari*, made a supplementary return; and then made another return, stating that the *supplementary* return was incorrect, the court refused to receive the *supplementary* returns, and expressed their strong disapprobation of the practice of preparing returns to *certioraris* for justices, without their request, especially by the party, or his attorney, who sues out the *certiorari*. (a)

IN ERROR, on *certiorari* from a justice's court.

A motion was made on the part of the defendant, that the additional return of the justice be received.

An affidavit of the attorney for the defendant was read, stating, that until after joinder in error, he did not know that

(a) A return to a *certiorari* will be set aside, if it be drawn by the attorney of the plaintiff in error. *Res v Johnson*, 3 Cowen, 30. *Hunter v. Graves*, 4 Cowen, 537. Unless he acted as a mere amanuensis for the justice *Phillips v. Caswell*, 4 Cowen, 505. *Vid. Wrightman v. Clapp*, 2 Cowen, 517.

the return of the justice was incorrect. The justice, also, in an affidavit, stated that the *certiorari* was delivered to him in *November* last, when he was from home, and the clerk of the attorney, who delivered it, told him the return must be made that day, and to save him trouble, he had drawn a return, which he wished the justice to sign; that the justice was in haste, and had not time to examine the return particularly, nor to compare it with his minutes, but he was told that if the return was incorrect, he might amend it afterwards, and he then signed it; but he now finds the return materially incorrect.

The amendments to the return were annexed under the hand and seal of the justice, in which the material corrections were stated.

In opposition to this motion, the affidavit of *James Morse* was read, stating that he served the *certiorari*, and presented a return for the justice, drawn by the deponent, who was present at the trial, and it was substantially correct; that he read the return to the justice, who agreed it was correct, and signed it; that there were blanks left, and the justice took the return home to fill them up, and the deponent called on the justice, at his house, who said he had examined his minutes, and believed the return to be correct; that the justice has told him since he signed the supplementary return, exhibited on the other side, and since notice of this motion, that he did it in haste, and finds it incorrect in several particulars, and that he had made a further return, contradicting *the last; that the justice is satisfied his first return is the most correct, except in one respect, stated in this last return.

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Per Curiam. We cannot grant the motion. The justice, since he made the supplementary return annexed to the notice of the motion, has made another, and declares, in that return, that the supplementary return was drawn in haste, and is incorrect, and that the first return is most correct. It is impossible to know the truth in a case in which the magistrate acts so inconsistently, and appears to be so weak in mind as to be at the power of the party who last advises him. The court have no alternative, but must reject both supplementary returns, and deny the motion; but in doing it, they express their strong disapprobation of the practice of preparing returns for a justice, without his knowledge and request, and that too by the party suing out the *certiorari*. If this case was not so extraordinary as to render any farther attempt at a new return dangerous, the court would be disposed to suppress the first return altogether.

Motion denied.

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v.
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THE PEOPLE, *ex relat.* BUSH and HIGBY, *against*
COLLINS.

An *alternative mandamus* was directed to a

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town clerk, commanding him to record the survey of a road, pursuant to the act, (24 sess. c. 136.) or show cause; and the clerk returned that he did not record the survey, because one of the commissioners had signed the survey by the name of *Zaccheus Higby*, whereas he was elected by the name of *Zaccheus Higby*, junior; and because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk, according to the act.

It was held that the return was insufficient, and a *peremptory mandamus* was awarded.

The addition of *junior* to a name is a mere description of the person, and the omission of it does not affect or invalidate any act or proceeding done by the same person. (a) The

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acts of an officer *de facto*, who comes into office, by color of title, are valid, as it concerns the public, or third persons who have an interest in his acts. (b)

A mere ministerial officer has no right to decide on the acts of such officer *de facto*, or adjudge them to be null.

(a) Even in pleading, the omission of a middle name is immaterial. *Franklin v. Talmadge*, 5 Johns. R. 84.

(b) Acc. *M'Intyre v. Tuxner*, 9 Johns. R. 135. *Reed v. Gillet*, 12 Johns. R. 396. *Wilcox v. Smith*, 5 Wendell, 237.

(c) 1 R. S. 513. sec. 55, 56.

(d) 1 R. S. 345. sec. 13, 14, 15.

the above-named commissioners did transmit and deliver to the clerk of the town of *Turin* such certificate, &c., according to the 7th section of the act, &c. That *Zaccheus Higby*, described in the writ of *mandamus*, was chosen a commissioner of highways, by the name of *Zaccheus Higby*, junior, and is known by that name, and no other; that a writing signed by *Oliver Bush* and *Zaccheus Higby* was left at the office of the defendant, in his absence, on the 21st of *February*, 1809, to be filed and recorded, being "minutes of the survey of a road," &c., setting it forth; and that for these reasons, because the said *Oliver Bush*, *Zaccheus Higby* and *James Miller* were not sworn into office, and the certificate of their oaths filed in the clerk's office, according to law, and because the writing, purporting to be a survey signed by the commissioners of highways, did not, as to the names of the commissioners, agree with the names of the persons who were elected, &c., he did not record the said survey of the said road, &c.

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Storrs said, that the facts in the return ought to be stated precisely and affirmatively, and not by way of inference. (2 *Burr.* 721. *Doug.* 144. *Salk.* 431. 434.) If the supposal of the writ be contradicted or denied, it must be denied directly. (*Salk.* 431, 432. 434.) The return to a *mandamus* should have all the certainty of a special plea. This case is analogous to cases arising under the acts of incorporation in *England*. The true construction of the act (24th sess. c. 78. sect. 7. and 13.)† 1 R. S. 343 is, that the election is merely voidable. It is enough that the office was full, or that there was an officer *de facto*. (*Salk.* 43. *Ld. Raym.* 1244. 5 *Term Rep.* 56. *Cowp.* 413.) Such an officer, being in by color of election, can only be removed by a *quo warranto*. (2 *Term Rep.* 239. 1 *East*, 78. 1 *W. Black.* 445. 3 *Burr.* 1454. *Cro. Jac.* 552. 4 *Burr.* 2008.) The commissioners might proceed to execute their duties, without taking an oath, but subjecting themselves to the penalty.

Again, the commissioners are not bound to take the oath before the end of 15 days; and suppose they *do an act before that time, will not such act be good? An officer *de facto* is one coming into office by color of election, and all his acts are good until he is removed. (16 *Vin. Abr.* 114.)

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[KENT, Ch. J. That law is too well settled to be discussed.]

The town clerk has no right to inquire or judge of the qualifications of the commissioners. It is enough that they are officers *de facto*, and that the paper comes from them. (4 *Burr.* 1991. 1 *W. Black.* 606.)

E. Williams, contra. The authorities cited for the plaintiffs are admitted to be good law, but we contend that they are not applicable. If this return is not sufficient, the court may order

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† 1 R. S. 348.
sec. 35.

‡ 1 R. S. 345.
sec. 13.

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a further return. The return states that *Zaccheus Higby*, junior, was the person elected, and his name and election are so recorded.

But it is a fatal objection in this case, that the commissioners have not accepted the office. It is not only necessary that the persons should be elected, but that they should accept the office. The 6th section of the act (24th sess. c. 78.)† says that if any of the officers chosen should refuse to serve, and the town shall not, in 15 days after such refusal, choose another officer in his stead, it may be lawful for three justices, under their warrant, to appoint such officer; and the 7th section‡ expressly requires that the officer shall, before he enters on the execution of his office, and within 15 days after his election or appointment, take the oath prescribed in the act. If, then, the person elected does not take the oath within the 15 days, it is a refusal to accept, and the office becomes vacant, so that a new election or appointment may be made. But if the office is already full, by a mere election, how can a new officer be elected or appointed? No *quo warranto* is *necessary in this case, because the act considers the office as vacant, and provides for filling it. In the case of *The King v. Love* (12 Mod 601. 5 Mod. 317. 2 Salk. 429.) it was held to be a good return to *mandamus*, that the officer had not taken the oath according to the statute.

Clark, in reply, observed, that if *Zaccheus Higby* and *Zaccheus Higby*, jun., were not one and the same person, the fact ought to have been expressly denied in the return. The return is like a plea to a declaration, and must contain every material averment, with the same certainty and precision, so that an issue may be taken thereon. What is not denied is admitted.

Per Curiam. The counsel in support of the motion for a peremptory *mandamus* contends that the return is insufficient:

1. Because *Zaccheus Higby* and *Zaccheus Higby*, junior, are the same person.

2. Because the relators were commissioners *de facto*, and their acts, as such, good.

3. Because the town clerk is a mere ministerial officer, and has no right to try the validity of the election of the commissioners in this way.

These objections are well taken. The addition of *junior* is no part of the name of the commissioner. It is a mere description of the person, and intended only to designate between different persons of the same name. It is a casual and temporary designation. It may exist one day, and cease the next. The question here is, whether the *Zaccheus Higby* who was elected commissioner, and the *Zaccheus Higby* who certified the survey, was one and the same person; and the return does not deny that fact, nor aver even an opinion or belief that they

were not the same person. The defendant was bound to aver the fact affirmatively and directly, if they were not one and the same person. No issue could be taken *upon the return in this respect, and it is essentially bad.

Nor is the allegation material in this case, that the commissioners had not caused a certificate of their oath of office to be filed in the town clerk's office. If the commissioners of highways acted, without taking the oath required by law, they were liable to a penalty; or the town, upon their default in complying with the requisition of the statute, might have proceeded to a new choice of commissioners. But if the town did not, (and it does not appear that they did in this case,) the subsequent acts of the commissioners, as such, were valid, as far as the rights of third persons and of the public were concerned in them. They were commissioners *de facto*, since they came to their office by color of title; and it is a well settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done; and this rule is adopted to prevent the failure of justice. The limitation to this rule is as to such acts as are arbitrary and voluntary, and do not affect the public utility. The doctrine on this subject is to be found at large, in the case of *The King v. Lisle*, (*Andrews*, 263.) It certainly did not lie with the defendant, as a mere ministerial officer, to adjudge the act of the commissioners null. It was his duty to record the paper; *valeat quantum valere potest*. It was enough for him that those persons had been duly elected commissioners within the year, and were in the actual exercise of the office. It may be that the oath was duly taken, and that the omission to file the certificate of it was owing to casualty or mistake. The validity of the title of the commissioners to their office must not be determined in this collateral way.

The opinion of the court, accordingly, is, that the rule for a peremptory *mandamus* be granted.

Motion granted.

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***BEEKER against PLATT.**

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THIS was an action of covenant for the non-payment of rent, reserved in a lease, brought by the lessor against the lessee, in which the plaintiff recovered judgment for less than 250 dollars, and had full costs of this court taxed.

J. V. D. Scott, for the defendant, now moved for a retaxation, on the ground that the plaintiff was entitled only to costs, as in the Court of Common Pleas.

In an action of covenant for the non-payment of rent reserved in a lease, if the plaintiff recovers judgment for less than 250 dollars, he is entitled only to the costs of the common pleas.

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Executors of
CLARK
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HOPKINS.

Van Buren, contra.

Per Curiam. There must be a retaxation of the costs. The plaintiff is only entitled to costs as in the Court of Common Pleas.

Rule granted.

THE PEOPLE *against* GILLELAND, late Sheriff, &c.

A sheriff was discharged from an attachment for not returning an execution delivered to his deputy 14 years ago, and who was dead.

THE defendant was brought up on an attachment, for not returning an execution issued out of this court, in the case of *Broekway v. Wilbie*.

It appeared that the *fi. fa.* had been delivered, about 14 years ago, to the deputy of the defendant, who was then sheriff of the county of *Rensselaer*, and that the deputy afterwards absconded from this state and died abroad; and it did not appear what had become of the writ.

Russell, for the plaintiff.

Foot, contra.

Per Curiam. It would be unjust and oppressive, after such a lapse of time, and the death of the deputy, to charge the sheriff. He must be discharged.

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*Executors of CLARK *against* HOPKINS.

After the lapse of 18 years, the court refused to permit a judgment to be entered up on a bond and warrant of attorney, on the usual affidavit, the legal presumption being that the bond was paid. (a)

KELLOGG, in behalf of the plaintiffs, moved for leave to enter up judgment on a bond and warrant of attorney of 18 years' standing. They were executed in 1792. He read an affidavit, stating that the bond was duly executed, and still remained due; and that the obligor was living, and that the reason why the judgment was not entered up before, was the insolvency of the obligor.

Per Curiam. It would be against all rule to permit a judgment to be entered up on a warrant of attorney, after the lapse of 18 years, on the usual affidavits. It has been decided, (6 *Mod.* 22. 1 *Burr.* 434. 4 *Burr.* 1963. 1 *Str.* 652. 2 *Str.* 826. 1 *Term Rep.* 270, 271. *Cowp.* 109. 214.) that after 18 and 20

(a) How far that presumption will be repelled by endorsements of payments made by the obligee, see *Roseboom v. Billington*, 17 *Johns. R.* 182.

ears, a bond will be presumed to have been paid. The obligee ought to show a demand of payment, and an acknowledgment of the debt, within that time, to rebut this presumption.

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V.
SKINNER.

Motion denied.

THOMPSON *against* SKINNER.

CADY moved to set aside the judgment and execution in this cause for irregularity. It appeared that the judgment was entered up and execution issued above 25 years ago: He read an affidavit, stating that the defendant died in the vacation, and before the *teste* of the execution, and that his heirs had ever since been under legal disabilities, either as infants, or *feme coverts*.

After the lapse of 20 years, no judicial proceeding can be set aside for irregularity. (a)

Sudam, contra.

Per Curiam. The motion must be denied. After the lapse of 20 years, no judicial proceeding whatever ought to be set aside for irregularity.

Motion denied.

(a) Vid. *Soulden v. Cook*, & *Wendell*, 217.

C A S E

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN MARCH, 1808.

WILLIAM ROGERS and ANN his Wife, appellants,
against
BERTRAM P. CRUGER, HENRY N. CRUGER, NICHOLAS
CRUGER, WILLIAM BARD and MARY his Wife, HENRY
CRUGER and CATHARINE his Wife, WILLIAM HEY-
WARD and SARAH his Wife, ANN TOWERS, MARGARET
TOWERS, CATHARINE TOWERS and MARY TOWERS,
respondents. (a)

Where *T.*, a
feme sole, resid-
 ing in *St. Croix*,
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 in *October*, 1800,
 gave a power of
 attorney to *A.*
 & *Co.* to act for
 her, in regard
 to her share of
 the estate of *C.*
 of *New-York*,
 deceased, of
 whom she was
 one of the heirs,
 and afterwards,
 in *April*, 1801,
 the answer of
T. to a bill in
 chancery, filed

THE appellant *Ann*, formerly *Ann Cruger*, exhibited her bill in the Court of Chancery, on the 18th of *May*, 1801, stating: that her late husband, *Nicholas Cruger*, *deceased, was seised and possessed of a very considerable real and personal estate, and on the 22d day of *February*, 1791, duly made and published his last will and testament, by which, after directing his debts to be paid, and directing his executors to make an inven-

(a) This case ought to have been printed in the *fourth* volume of these reports, but want of room prevented its insertion at the time, and it was afterwards intended to be omitted altogether; but as it has been supposed to involve the decision of some points of importance, which may be useful to the profession as well as in the final decision of the controversy between the parties, it is now reported. Though the case has been much abridged, its length, it is to be feared, remains more proportioned to the magnitude of the property in controversy, than to the importance of the legal questions brought into discussion.

tory of his estate, as soon after his death as convenient, he devised as follows:—

"I give and bequeath to my respectable and aged uncle, *John Cruger*, Esq., the annual sum of one hundred and fifty pounds during his natural life, the first payment to be made to him in one year after my death, and on that day yearly during his natural life. *Item*. The rest and residue of my estate, both real and personal, I will and devise, in manner following, that is to say; I give, devise and bequeath one third part thereof to my beloved wife, *Aun Cruger*, and to her heirs and assigns for ever; and it is my will that my said wife may, if agreeable to her, take the said one third part thereof out of such part or parts of my estate, real and personal, or out of either of them as she may choose, so that, on a fair and equitable valuation or appraisement of the same, the said part or parts she shall so choose, shall not together exceed the value of one third of my said real or personal estate, as first above devised and bequeathed to her. *Item*. I give to my said wife and to her executors and administrators, all her wearing apparel, rings, jewels, and other personal ornaments whatsoever. *Item*. I give, devise and bequeath the remaining two third parts of my estate, both real and personal, to my children, sons and daughters, as well those of my first marriage, as those of my second, (they being all equally near and dear to me,) to be divided among them share and share alike. And I do hereby order my executors, *hereinafter named, to pay to each of them their said separate shares on their arriving to the age of 21 years; but should any or either of my said children die before his, her, or their age of 21 years, and without issue, then it is my will, that his, her, or their share or shares, lapse, and that the same go to and be equally divided among his or their surviving brothers and sisters, or such of them as survive, share and share alike. And whereas, by the death of my first wife in the island of *St. Croix*, the laws of *Denmark* and that island entitled my children by my first wife, to a certain part of my estate in the said island of *St. Croix*, and elsewhere. To the intent, therefore, that my children by my present wife receive an equal share with the children by my first wife, it is my will and desire, that that part of my estate shall be considered as part of the two thirds of my estate as above given, devised and

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relative to the estate of *C.* was signed by *A.* with the name of *A. & Co.* as attorneys of *T.*, but without any knowledge of the marriage of *T.*, or revocation of the power; it was held that the answer was not properly signed or put in, and that the subsequent proceedings were, therefore, irregular.

It seems, that a general power to act relative to the management of an estate, does not

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authorize the attorney to put in an answer for his principal to a bill in chancery relative to it; and that answers to bills in chancery must be signed by the party, and put in under oath. (a)

An infant cannot bind himself by his own assent, nor even by the consent of a guardian, unless his acts are deemed, by a court of chan-

cery, beneficial to the infant.

Where *C.*, by his last will and testament, devised one third of all his estate to his wife, to be taken out of such parts of the estate, real or personal, as she might elect, so that, on a fair and equitable valuation and appraisement of the same, the parts she should choose should not exceed the value of one third of his estate, &c., under an order of the Court of Chancery the whole of the estate, real and personal, of *C.* was valued and appraised by three persons, appointed and sworn as appraisers, and the widow made her election of parts of the real and personal estate, amounting to one third of such appraised value. At the instance of the heirs and devisees, the appraisement was, afterwards, set aside, on the ground of a gross mistake of the appraisers in calculating the value of a certain part of the real estate, connected with other circumstances in the case, though no actual misconduct or fraud was to be imputed to the appraisers.

(a) The answer of an agent to a bill in chancery is not evidence against his principal. *Loels v. Marine Ins. Co.* 2 Wheat. 380.

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bequeathed to all my children. But if my said children, or either of them, by my first wife, shall take and receive to his, her, or their separate use, the aforesaid part of my estate in the island of *St. Croix*, or elsewhere, which, by the said laws thereof, and those of *Denmark*, they are entitled to, then it is my will, and I hereby order and direct, that it be considered as taken and received as part of his, her, or their legacies or legacy herein devised and bequeathed to them, and each of them; but should their separate shares of that part of my estate amount to as much as the whole of his, her, or their legacies so as aforesaid devised to them and each of them, that then it be considered as taken and received in full satisfaction thereof.

Item. I hereby nominate, constitute and appoint my beloved wife, *Ann Cruger*, executrix, and my respected friends, *Robert Watts*, *John Watts* and *Cornelius Stevenson*, all of the city of *New-York*, Esqrs., executors of this my last will and testament.

Item. It is my will that my said executors, as soon after my death as my said wife shall choose, assign and convey to her the one third part of *my estate, real and personal, as herein before devised and bequeathed to her, and in manner and form as is therein mentioned. *Item.* I hereby give full power and authority to my said executors, and the survivors and survivor of them, to manage, repair and improve all my estate, both real and personal, to the best advantage, for my several devisees and legatees; and at their discretion to sell both real and personal estates, or lease or rent the same, and the moneys thereon arising to lend and place out at interest upon good and sufficient security, either real or personal, as my said executors or the survivors and survivor of them shall think proper, and that so much of the income or interest thereof on the separate shares of my said children, as will be necessary and sufficient for their and each of their support and education during their and each of their infancy, it is my will, and I hereby order and direct that my executors pay the same to them, or for their use, either annually or otherwise, as occasion or their said necessities may so require. And that if the interest or income of their and each of their shares of my said estate, shall be more than sufficient for the purposes of their and each of their education and support during their infancy, then it is further my will that the balance, or overplus thereof, be also placed out at interest, (as it shall arise,) on good security, for their and each of their separate use, and that the same be paid to each of them at the times and in the manner their and each of their legacies are herein before directed to be paid. And to the end that my executors may the better perform this my will, I do hereby give them full power to bargain, sell, dispose of, and convey all or any part of my real estate, in any part of the world, to any person or persons, or body corporate, and to his, her, or their heirs and assigns for ever, in fee simple; and one or more deeds for the same to execute and deliver, as such sale or sales

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may require; and at their discretion to submit to arbitration, compromise, *and settle all and every or any differences and disputes that may arise in and about the execution of this my last will and testament," &c.

In November, 1799, the testator, with his wife, went to *St. Croix*, where he had formerly resided, and died there in the March following. Before his death, on the 16th of January, 1800, he made the following codicil to his will:—

"Whereas, from indisposition, as well as from other causes, I have found it necessary to return to this island, where part of my property lies, arising from inheritance in right of my first wife, *Ann Cruger*, born *De Nully*, and my present wife, *Ann Cruger*, born *Mackoe*, both or neither of which are mentioned or included in my preceding will, have thought it necessary to make the following arrangement in this codicil with respect to said property, intending the same to be as binding, and as of full effect, as all and every clause in my said preceding will, bearing date the 22d February, 1791, viz. it is my wish and desire, that the children of my above-mentioned first wife shall inherit and receive to themselves only, all that part or share of the property coming to me from the joint estate of Major and Madame *De Nully*, in right of my marriage with their daughter, leaving to my sons and daughters, by said marriage, the whole thereof, to be equally divided between them, the daughters to have equal shares with the sons. It is also my will and desire that the whole of the property coming to me from the estate of *Isaac* and *Elizabeth Mackoe*, shall be and remain the whole and sole property of my beloved wife, *Ann Cruger*, during her natural life, and to be at her entire disposal after the same, so that she shall not be accountable to any person whatever, for any disposition she may think proper to make of the same.

"And I have also thought it proper that some person in this island should be joined with my executrix and executors named in my said will above-mentioned. I do hereby nominate and appoint Mr. *William H. Krause* to *act jointly with my before-mentioned executors and executrix. Finally, ratifying this codicil, and declaring it of as full effect and validity as my will frequently before-mentioned. In witness," &c.

The bill further stated, that *Robert Watts*, *John Watts*, *Cornelius Stevenson* and *William H. Krause* had refused to act, or qualify as executors of the said will, or to do, or join in any acts they, as executors, were therein empowered to do; and thereupon *Ann*, the widow of the testator, had exhibited and proved the said will and codicil, and took upon herself the sole administration thereof. That she had afterwards also caused the said will to be proved in the Supreme Court, according to the statute in such case provided, and the same was therein recorded according to law; but that the codicil, not being executed in the "presence of three witnesses," could not be

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proved and recorded, as a will affecting real estate. The heirs of the testator were *Bertram P. Cruger*, *Henry N. Cruger*, *Nicholas Cruger*, *Betsey Towers*, *Catharine Cruger* and *Polly Cruger*, by his first wife; and one daughter by the respondent *Ann*, named *Sarah*, and married to the respondent *William Heyward*, on the 25th May, 1804. *Catharine* married the respondent *William Bard*, in October, 1802, and *Mary* married the respondent *Henry Cruger*, in September, 1782. *Catharine*, *Polly* and *Sarah* were under twenty-one years, at the death of the testator. The executors having refused to execute any of the powers or trusts thereby vested in them, there was no person who could make or execute, or from whom the said *Ann* could receive the assignments and conveyances of the share of real or personal estate to her thereby devised and directed to be made; and that, by reason of the infancy of some of the heiresses of the said *Nicholas Cruger*, deceased, no valid agreement could be made for the appraisement and valuation of the said real estate, without the aid of a court of equity, by which the *said *Ann* was in danger of being deprived of the right of electing her one third of the real and personal estate, or of having the same so vested in her, so as to be free from the risk of litigation thereafter. That she had applied to the heirs for this purpose, who did not object to her requests; but as some of them were infants, *who could not bind themselves by their assents*, they were desirous of receiving the direction of the Court of Chancery; and the bill prayed that appraisers might be appointed to value the real and personal estate of which the said *Nicholas Cruger*, deceased, was seised and possessed when he made his will, and at the time of his death; that her right to elect one third part in the real and personal estate, or out of either of them, as she might choose, might be confirmed to her, and her title thereto established, and process of *subpœna* issue against the heirs. The bill was filed in the office of *Isaac L. Kip*, as the plaintiff's clerk in court.

It appeared that the appellant *Ann*, after her return to *New-York*, in October, 1800, divided the sum of 58,453 dollars and 37 cents between herself and the children of the testator, according to their respective shares.

In October, 1800, *Elizabeth Towers*, with the consent of her curator, *Alexander Maitland*, sent a full power of attorney to *John Nixon* and *David Walker*, merchants in *Philadelphia*, to act for her in regard to her proportion of the testator's estate; and in April, 1801, she and the said *Maitland* intermarried.

To this bill was put in an answer, purporting to be by *Bertram P. Cruger*, *Henry N. Cruger*, *Nicholas Cruger* and *Betsey Towers*, who therein admitted the will and codicil of their father as set forth in the bill, and that the same was proved by the said *Ann*, as sole qualified executrix, the executors having refused to act. That the said *Ann* did apply to them to have

the estate appraised, and that they did not object to any safe and equitable method of having the said estate appraised and valued, *and submitted themselves to the court. This answer was subscribed as follows:—

“BERT. PETER CRUGER,”
 “HENRY N. CRUGER,”
 “NICHOLAS CRUGER.”

“JOHN NIXON & Co., attorneys }
 for Mrs. TOWERS.”

“SAMUEL M. HOPKINS, *solicitor for defendants.*”

Taken by consent, without oath.

Filed 17th of May, 1801, in the office of *Thomas Smith.*

On the 14th day of May, 1801, in a cause entitled, “*Catharine Cruger, Polly Cruger and Sarah Cruger*, who are impleaded with others at the suit of *Ann Cruger*, executrix,” &c., an order was made, “that *Isaac L. Kip*, Esq., one of the clerks of this court, be appointed guardian for the said infants in this cause, by whom they may appear and answer.” The said infants, *Catharine, Polly and Sarah*, by the said *Isaac L. Kip*, their guardian, put in an answer to the said bill, marked by the clerk to have been filed also on the 17th day of May, 1801, in which they say they believe the matters in the bill mentioned are true. That they had not objected to any safe and equitable mode of having the estate appraised, but as they are infants, incapable of assenting to any acts by which their inheritance shall be affected, they submit themselves to the judgment of the court, whose peculiar province it is to protect the right of infants, in the premises, and humbly hope their rights will be protected and preserved.

SAML. M. HOPKINS, *solicitor for defts.*

Taken without oath, by consent.

It appeared that the appellant *Ann*, and the respondents *B. P. Cruger and Henry N. Cruger*, the only two heirs then of age, and in *New-York*, and who, it was understood, *acted for all the children, except *Sarah Heyward*, agreed to take the opinion of Mr. *Harison* and Mr. *Hopkins*, as counsel for all parties; and they advising an *amicable* suit in chancery, by the appellant *Ann*, against the children, it was agreed that Mr. *Hopkins* should appear as solicitor, and Mr. *Harison* as counsel, and that the latter should sign the pleadings on the part of the complainant, and the former those on the part of the defendants; and that all the answers might be put in without oath. When the answers were put in, it was not known that *Elizabeth Towers* had married.

On the 18th day of May, 1801, on the motion of Mr. *Harison*, and by consent of Mr. *Hopkins*, it was ordered that

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Nicholas Low, Henry Rutgers and John De Wint be appointed to appraise and value the real and personal estate, whereof the said *Nicholas Cruger* died seised or possessed; that they take an oath, faithfully to execute the trust reposed in them by this order, and then proceed to appraise and value all the real and personal estate, whereof the said *Nicholas Cruger* died seised or possessed, distinguishing the separate values of each parcel of real property, and of each species of personal property, and report without delay.

On the 16th day of *June*, 1801, on reading an affidavit that *Henry Rutgers* and *John De Wint* could not attend to the duties of their appointment, *Abijah Hammond* and *John Lawrence* were appointed in their places, and any two of them had power to act. The three appraisers took an oath, as required, on the 8th day of *July*, 1801.

On the 17th of *November*, 1801, the appellants, *William Rogers* and *Ann*, intermarried, and about ten days thereafter went to the island of *St. Croix*, and did not return until *July*, 1802.

On the 26th of *March*, 1802, *William Rogers* and *Ann* his wife filed their bill, stating the proceedings above-mentioned; *and referring thereto, further set forth that since those proceedings, *Betsy Towers* had died, leaving *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers*, her children and heirs; and that on or about the 17th day of *November*, 1801, the said *William* and *Ann* intermarried, and the said cause was thereby abated: but that the plaintiffs having jointly the same right which the said *Ann* had before, the bill prays that the said suit may stand revived, and be in the same plight against the said *Bertram P. Cruger*, *Nicholas Cruger*, junior, *Ann Towers*, *Peggy Towers*, *Catharine Towers*, *Mary Towers*, *Catharine Cruger*, *Polly Cruger* and *Sarah Cruger*, as the same was at and immediately before the marriage; or that the defendants show cause to the contrary: and in particular, that the said *William* and *Ann* may have the same right of electing the one third part of the real and personal estate devised to the said *Ann*, to be taken out of either the real or personal, as they may choose, and that their title thereto may be established. Process of *sulpana* to appear and answer was prayed against the defendants above named.

Bertram P. Cruger, *Henry N. Cruger* and *Nicholas Cruger*, junior, put in their answer on the same 26th day of *March*, 1802, admitting the truth of the facts in the bill mentioned, and submitting themselves to the judgment of the court.

On the 13th day of *April*, 1802, an order was entered stating that the bill of revivor and supplement had been filed in this cause, and *Mr. Harison*, of counsel for the complainants, suggesting to the court, that since the filing the original bill, *Betsy Towers*, one of the defendants, answered the same, after which she died, and that *Ann Towers*, *Peggy*

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Towers, Catharine Towers and Mary Towers are her only children and heirs, and that she had no executor, administrator, or other representative, except the said children; thereupon, on reading the affidavit of *Samuel M. Hopkins*, it was ordered that the said suit stand revived against the said representatives of the said *Betsey Towers*, who have become interested by her death in the matters in question.

On the 14th day of *April*, 1802, *Isaac L. Kip* was again appointed guardian for *Catharine, Polly and Sarah Cruger*, infants, to appear and answer for them in that cause.

On the 5th of *August*, 1802, an answer was put in for these infants by their said guardian, admitting the bill; but they said, inasmuch as they are infants, incapable of binding themselves by their own act or assent, they submitted themselves to the court, whose peculiar province it is to protect the rights of infants, and they humbly hoped theirs would be protected. This answer was signed by the infants, and by their guardian and counsel. It was not sworn to by the guardian, nor by the infants, nor did there appear to be any order or consent that it should be received or filed without oath.

On the 28th of *February*, 1803, the defendants presented their petition, praying that the filing of the report of the appraisers be stayed till further order, that the same might not be inspected by the plaintiffs, or any person on their behalf, and that the plaintiffs should forthwith designate or elect, from a schedule of the estate in their possession, their proportion of the said estate, subject to a final liquidation, according to the appraised value; and on the 7th day of *March*, 1803, an order was made, and the prayer of the said petition granted, so far as related to staying the filing of the said appraisement.

On the 17th day of *May*, 1803, the appellants filed a paper, subscribed by *Egbert Benson*, their counsel, and dated on that day, whereby they designated and elected the following parcels or articles, and in the following order: 1. The farm called *Rose-Hill*. 2. Lot on the opposite side of the road. 3. Pew in *Trinity Church*, No. 24. 4. Book debt against *Wm. Rogers*. 5. Book debt against *Wm. H. Krause*, 32,716 dollars and 29 cents. 6. Book debt against *Quinton Dick & Co.* 7. Bond and mortgage against *John Cooke*. 8. The 8 per cent. stock of the *United States*. 9. The 3 per cent. stock. 10. The shares in the *United Insurance Company*, standing in the name of *Ann Rogers*. 11. The shares in the *United States Bank*. 12. The 6 per cent. navy stock. 13. Twenty of the shares in the *Bank of New-York*. 14. Twenty of the shares in the *Bank of Albany*. 15. Shares in the *Manhattan Company*.

The appraisement was dated the 7th of *March*, 1803, and filed about the 20th of *May*, 1803; and on the 28th of *May*, 1803, an order was entered, on the motion of the defendants' counsel, by consent of the counsel for the complainants, that

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the report of the appraisement, filed in the cause, and the paper filed, purporting to be the designation or election of the complainants, of the articles, as the one third part devised to the said *Ann*, be referred to a master; that each party be at liberty to except to all or any of the valuations in the said appraisement, touching which the master might examine witnesses; that the master should inquire into the whole amount of the aforesaid estate, and report the same, together with the amount and particulars of the property elected by the complainants.

The whole estate, as valued in the seven schedules annexed to the report of the appraisers, was as follows:—

Real estate, exclusive of such as was purchased by the testator after making his will,							D.	C.
-	-	-	-	-	-	-	122,905	62
Dower estate,	-	-	-	-	-	-	71,713	90
Stock,	-	-	-	-	-	-	141,779	69
Debts, (good,)	-	-	-	-	-	-	307,563	9
Furniture,	-	-	-	-	-	-	852	75
							<hr/> 644,814	
							15	

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*Doubtful debts,	-	-	-	-	-	-	80,092	66
Bad debts,	-	-	-	-	-	-	55,030	25

On the 21st of *May*, 1804, an order was entered in the Court of Chancery, in a cause entitled *William Rogers* and *Ann* his wife, against *Bertram P. Cruger*, *Henry N. Cruger*, *Nicholas Cruger*, *Henry Cruger* and *Mary* his wife, *William Bard* and *Catharine* his wife, *Sarah Cruger*, *Ann Towers*, *Margaret Towers*, *Catharine Towers* and *Mary Towers*, wherein it was ordered by consent of parties, 1st. That the order of the 8th of *May* last, referring to a master the appraisement of the estate of *Nicholas Cruger*, deceased, be discharged, and that the writing purporting to be the election by the complainants of the several parcels, or articles, as the one third of the said estate devised to the complainant *Ann*, and the said appraisement be deemed to be confirmed, but to remain still in the hands of the master, subject to the further order of the court. 2. That the complainants be deemed to have disclaimed all right to lands purchased after the date of the testator's will, except the dower of the said *Ann*. 3. That all controversies between the parties, relative to the testator's estate, be deemed to have ceased, except a claim made by the defendants, (except *Sarah*,) to be paid their proportions of a certain estate, or moneys mentioned in a writing executed at *St. Croix*, on the 27th of *August*, 1792, by *Henry Cooper*, as attorney for said testator, in relation to which the defendants may file a new

bill, or amend their answers in this suit; and except, further, all questions that may arise on taking the accounts of the complainants' administration, and that it be referred to a master to take such accounts, and the receipts and payments of the complainants, and of such payments to and receipts by the defendants as may be requisite to a final settlement and division, and that he may report specially from time to time; and that all questions of costs be reserved until the *final decree. 4th. That there shall be forthwith a division in part of the estate of the said testator, between the complainants on the one part, and all the defendants on the other, and between the defendants themselves, as specified in the schedule annexed, this day filed, and that the stock and the sums therein mentioned to make up the balances of the several accounts due to each of the defendants, except the said *Sarah*, be immediately, on demand, transferred and paid to the said defendants, and that the securities be forthwith assigned and delivered to them. 5th. The said *Ann* to be deemed seised and vested in severalty, with the several parcels of real estate therein specified as her share, and that the defendants be deemed vested of the remainder, according to their interests therein; that such conveyances and releases be executed under the direction of a master, as may be requisite. Provided, that the said division is not to prejudice the defendants' claim upon the complainants, if any loss should be sustained by their neglect.

The valuation of the one *third* elected by the widow, was stated in the report to be as follows:—

	D.	C.
<i>Rose-Hill</i> farm, - - - - -	50,000	00
Lot opposite, - - - - -	2,500	00
Pew in <i>Trinity Church</i> , - - - - -	375	00
Eight <i>per cent.</i> stock, 12,600, - - - - -	13,860	00
Three <i>per cent.</i> 4,201, - - - - -	2,436	58
Six <i>per cent.</i> navy stock, 500, - - - - -	500	00
Shares in the United Insurance Company, - - - - -	13,250	00
Three shares in the Bank of the <i>U. S.</i> - - - - -	1,752	00
Six shares in the Bank of <i>New-York</i> , - - - - -	4,440	00
Debts, to wit: <i>William Rogers</i> , - - - - -	44,246	96
<i>William H. Krause</i> , - - - - -	32,716	29
<i>Dickson & Stockholm</i> , - - - - -	1,098	93
Balance to complainants, - - - - -	10,122	38
Total,	177,298	14

*In consequence of the partial division, the heirs of the said *Nicholas Cruger* applied to the Supreme Court for partition of the lands therein given up to them, the said *Bertram P. Cruger* being appointed guardian for the said *Towers*, and judgment of partition was given, and the lots and houses in *New-*

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York were advertised for sale, in pursuance thereof, in the spring of the year 1805, and the parties proceeded on the said order for a division in some other particulars; and the said *William Rogers* completed the same on his part, except as to the stock of the *United Insurance Company*, which stood in the name of the said *Nicholas Cruger*, being twenty-five shares, which was to have been transferred according to the said order, but was not transferred; and the said *William Rogers* has received the dividends upon the same ever since, and the mortgage to the said company, on *Union Hall* estate, which, by the appraisement, was to have been paid out of it, has not been paid.

On the 15th of June, 1805, *Bertram Peter Cruger*, for himself, *Nicholas Cruger*, *Henry H. Cruger*, *William Bard* and *Catharine* his wife, *Henry Cruger* and *Mary* his wife, and *Ann Towers*, *Peggy Towers*, *Catharine Towers*, and *Mary Towers*, infants, by the said *Bertram P. Cruger*, their guardian and next friend, presented their petition to the Court of Chancery, setting forth the said original bill, and the answers thereto, the bill of revivor and the answers thereto; that the bill and the answers were drawn by the same solicitor, being an amicable suit; that three persons were appointed by an order, entered as by consent of the solicitors, to appraise the said estate, which commissioners made their report, the election of the said *Ann* to take her third, as before mentioned, in certain articles *subject to a final liquidation*, and that the said report had been referred to a master; that controversies arising; the solicitor, who had acted for the petitioners, desired them to appoint another solicitor, as he thought it not proper to conduct the business for them *further than as the same was conducted by mutual consent; whereupon they appointed another solicitor, and their former solicitor was appointed solicitor for the complainants; that, afterwards, *William Bard* intermarried with *Catharine Cruger*, and *Henry Cruger, jun.* with *Mary Cruger*; that *Elizabeth Towers* had intermarried with *Alexander Maitland*, and had departed this life, leaving her said children her heirs; that the said bill was not revived against the said *Elizabeth Maitland* and her husband, nor were her children regularly made parties to the suit. They further stated, that soon after the said appraisement, the petitioners applied to the said *William Rogers* for a division of at least the rents and profits of the said estate, giving each his portion thereof, which he refused; whereby some of them were put to inconvenience, and were obliged to borrow money to support their families for a considerable time. That, in May, 1804, the petitioners, some of whom were then infants, and others lately come to age, were ignorant of the real value of the farm called *Rose-Hill*, and the lot adjoining, and the said *William Rogers* withholding from them two hundred thousand dollars and upwards, their proportion of their father's real and personal estate, and

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the annual income thereof, until they should consent to the proposed division, valuation and election, they directed their counsel to consent thereto, and the order of the 21st day of *May*, before mentioned, was, accordingly, agreed to. That considerable sums still remained in the hands of the said *William Rogers* to be divided, and the delay in relation to the stock had occasioned to them a loss of from ten to twenty per cent. The petition further stated, that some months after the said rule, a sale of some lots of ground, about half a mile farther from the city of *New-York* than *Rose-Hill*, was made, at from three to four thousand dollars per acre; from which, and other sales thereabout, they had discovered, and expected to be able to prove, that the said farm of ninety-two acres of land, *which is about one mile from the streets of *New-York*, fronts on the *East* river and the post road, and is highly improved, would sell for upwards of two thousand dollars per acre, one with another. That they were ignorant what was the real value of the said farm, when the said rule was entered, and although they believed it was low, yet they had no idea or suspicion that the valuation was so grossly inadequate. That some of them being put to great inconvenience and mortification by being obliged to borrow money for the ordinary support of their families, and acting as they did under a misrepresentation, the said *William* took an undue advantage of their situation, by insisting on a confirmation of the said valuation, as a condition of giving them their own property, and the advantage thereof ought not to be retained by him. That they were much injured and aggrieved by the error in the valuation of the said two farms, and the said *William* and *Ann Rogers* taking the same at that valuation; and, as an evidence of the said error, four of the petitioners offered to pay for it, subject to General and Mrs. *Gates's* lease for life, one hundred thousand dollars, payable in such short time as the court might direct, the money to be divided as the will requires; or to admit the said *William* and *Ann* to retain them at a fair valuation. The petition prayed that the said order of the 21st *May*, 1804, might be set aside, (the petitioners offering to relinquish all orders made since that time, if the plaintiff required it,) for the following reasons:—

1. Because *Mary Cruger* was an infant at the time when the said order was entered.

2. That four of the persons named in the title of the cause in the said order were not parties in the suit, and were not bound by those proceedings.

3. That *William Bard* and *Henry Cruger* were not parties to the suit, and it had abated against their wives by their inter-marriage, and, therefore, they were not bound by what was done.

*4. That the appraised value of the said two farms was less than one half their real value, and the order for confirming the

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same was agreed to, from ignorance and misapprehension of its real value, and from an anxiety to get possession of what was not disputed, the withholding of which until a final division could be made, was taking an undue advantage of the situation of the petitioners, unjust in itself, and contrary to the express direction of the will of their father.

5. That Mrs. *Towers*, afterwards Mrs. *Maitland*, never was a party to the said suit, nor were her heirs parties thereto.

Bertram P. Cruger, Nicholas Cruger, William Bard and Henry N. Cruger verified the facts set forth in the said petition, in substance, by their affidavits, and further deposed that they had no idea, that the said two farms had been valued at a sum so greatly short of the real value, until several pieces of ground were sold at auction at *Kip's Bay*, shortly after the said rule was entered, for from three to four thousand dollars per acre. That *Kip's Bay* is about half a mile farther from *New-York* than *Rose-Hill*, and the latter, at least, not much inferior in value to the other, except the encumbrances for the life of General and Mrs. *Gates*. That they believed it was then worth more than one hundred thousand dollars, and they offered to give that sum for it, subject to the encumbrance. They also deposed that they received from the said complainants, no money or property from about the month of *October*, 1802, until *June*, 1804. That applications for money were made within that period, and the same were refused; and that the stock was considerably lessened in value before it was received by the petitioners.

The chancellor ordered copies of the petition and affidavits to be served on the complainants, that the merits of the petition should be heard at the then next term, and that an injunction should issue to stay the sale of the houses and lots, under the judgment for partition, until *further order; of all which the complainants were served with due notice.

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Upon the hearing, the respondents exhibited to the court a correspondence, by letters, between *Bertram P. Cruger*, on behalf of the heirs, and the said *William Rogers*, in *June* and *July*, 1803, which it is not deemed necessary here to state.

The petition was argued in *May*, 1806, and in *September* following, the chancellor pronounced an opinion in favor of the petitioners; but, on the application of the complainants' counsel, ordered another argument.

In *March*, 1807, the respondents, being the petitioners before mentioned, exhibited a further petition to the court, stating their former petition, and the orders made thereupon, and stating further that they had since discovered that a paper purporting to be the answer of *Elizabeth Towers*, and subscribed "*John Nixon & Co.*, attorneys for Mrs. *Towers*," to *Ann Cruger's* bill, was filed on the 17th day of *May*, 1801, in the clerk's office, when no such bill was filed; the said bill not being filed until the 18th of *May*, 1801; that Mrs. *Towers*, about the 1st of

May, 1801, previous to the filing the said bill, was married to *Alexander Maitland*, and consequently could not appear to, nor answer, nor be made a party to any suit against her, by the name of *Towers*. That the said *Alexander Maitland* and *Elizabeth* his wife made a joint will, according to the laws of *St. Croix*, where they then resided. That the said *Alexander Maitland* departed this life in the month of *September*, 1801, and the said *Elizabeth* departed this life soon afterwards, having first made and published her last will and testament, and therein appointed *William M' Cormick*, *Francis Claxton* and *William Mitchell* executors thereof, and also guardians of the petitioners, *Ann*, *Peggy*, *Catharine* and *Mary Towers*, her children. And the petition further stated, that inasmuch as neither said *Elizabeth Maitland*, nor her husband, nor their representatives, have ever been *made parties in this suit, as they have both made testamentary dispositions of their estate, the particulars of which are unknown to the petitioners, and inasmuch as no order or decree can bind them or the parties and settle their rights, the petitioners pray that the paper purporting to be the answer of *Elizabeth Towers*, be taken off the files of the court, and that all proceedings in the cause subsequent to the filing the original bill of *Ann Cruger* be set aside, and all orders therein be vacated, or that such other order be made thereupon, as may be proper and agreeable to the practice of the Court of Chancery.

With the said petition was exhibited the affidavit of *William M' Cormick*, of the island of *St. Croix*, who made oath that *Alexander Maitland* and *Elizabeth Towers* were married some time between the twenty-eighth day of *April* and the fourth day of *May*, 1801; that the said *Alexander* died in *September*, and the said *Elizabeth* in *October*, following, in the same year; that the said *Alexander* and *Elizabeth* made a joint will; that the said *Elizabeth* also made a will, and appointed him, the deponent, *Francis Claxton* and *William Mitchell*, of *St. Croix*, executors thereof, and guardians of her children, in which capacities they have acted.

A copy of the said petition and affidavit was served on the appellants, on the 26th *March*, 1807, with notice that the same would be presented, when the further argument of the former petition should come on, and that the same would be supported and insisted upon, as well from the former affidavits as that of the said *William M' Cormick*.

In the *May* term of 1807, the two petitions aforesaid were heard by the chancellor, and the appellants exhibited various affidavits and letters, which were read, but which it is not necessary here to insert.

Nicholas Low, *Abijah Hammond* and *Jahn Lawrence* deposed, that they did not disclose to the complainants, or any other person, prior to the return of the appraisal, *the value

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affixed to the estate of *Nicholas Cruger*, deceased, by the appraisers, except to each other.

Thomas Cooper proved a sale of some land three miles and three quarters from the *City-Hall* of *New-York*, at auction, for cash, on the 15th of *August*, 1803, formerly belonging to *Thomas B. Brigden*; it was surveyed into different lots, and sold at different prices, from 800 to 300 dollars per acre.

John Titus deposed that in *June*, or *July*, 1802, he treated with *Mr. Kip* for four or five acres of the farm, called *Kip's Bay*, adjoining the post road in front of *John Murray's* land, now called *Inclenberg*. He offered 350*l.* per acre, and *Kip* asked four hundred pounds per acre.

Philip Hone deposed that on the 16th of *May*, 1804, he sold at auction in *New-York*, for the proprietors of the farm at *Kip's Bay*, ten lots adjoining each other, at a place called *Inclenberg*, bounded in front on the post road, and in the rear by a street sixty feet wide, distant about six hundred yards from *Rose-Hill* farm; each lot fifty feet front, and four hundred in length. The whole sold for 10,870 dollars.

William Bayard, *Charles Wilkes* and *Thomas Cooper*, having been appointed, by the Court of Chancery, general guardians of *Ann*, *Margaret*, *Catharine* and *Mary Towers*, they presented a petition, at the hearing of the argument on those petitions, in the names of these infants, giving a statement of the proceedings, tending to support them; that the application by the said *Bertram P. Cruger*, on behalf of the said infants, was an unauthorized act of the said *Bertram P. Cruger*, and of his solicitors or counsellors, without the knowledge or consent of those infants, or of any person authorized to assent or act for them. The said petition further stated, "that the petitioners are advised and firmly persuaded, that it would be greatly against the interest of the petitioners, to have the said proceedings in the said suit, or *the said order set aside, by reason of any want of form, which may have been in the proceedings in the court. But so far as it may appear to the court, that the said estate or farm called *Rose-Hill*, or the said four and three quarters acres opposite thereto, have been appraised under their value, the petitioners conceived it would be to their interest to have a new estimation or appraisement thereof; the petitioners offered to file an answer to the said original bill and bill of revivor, *nunc pro tunc*, and therein and thereby to admit all the material facts set forth in the said original bill and bill of revivor, in order that all the proceedings which had been had thereon in this honorable court might be confirmed, except the valuation and appraisement of the said two estates at *Rose-Hill*, which the petitioners, however cannot say any thing about, nor whether the same was too low or not." The petition then prayed that all the said proceedings might be confirmed, unless it should appear that *Rose-Hill*, and the adjacent lands had been *unduly valued*, and ther

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they prayed such relief, as to the said appraisement, as to the court might seem proper.

The two petitions having been fully argued, (the first a second time,) his honor the chancellor, on the 18th of *September*, 1807, delivered his opinion upon the merits of them, and made the following order: "That all proceedings whatsoever, purporting to have been against *Elizabeth Towers*, the mother of *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers*, who are infants, and also against the said infants, be, and the same are, hereby set aside for irregularity. And it is further ordered, that all proceedings in this case against the other defendants, subsequent to the putting in of their answers to the bill of revivor, be set aside by reason of irregularities in the said proceedings, and that the question of costs be reserved." From which order the present appeal was made.

*The reasons for this order were thus assigned by

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The CHANCELLOR. The defendants presented their petition, praying for a *hearing*, upon the merits of an order made in this cause on the 21st day of *May*, 1804.

After having been fully heard on its subject matter, and having, in the preliminary discussion travelled with great minuteness through the merits, and after an opinion was expressed thereon, it was discovered, that either the court or the parties had labored under some misapprehension on the occasion, as to the precise object of the argument, and the order of the court was, in consequence of it, so modified as to limit it to a hearing, leaving the merits generally open.

In a cause involving a question on property of such great extent in value as the present, I could certainly have had no repugnance to receive every elucidation which the subject was susceptible of. And my intimation on the occasion was merely to repel the force of the precedent it might be otherwise deemed to make. It has not been usual so to conduct applications for a rehearing. This was less formal, as arising on a decretal order only, and not on a final decree, and could not have been yielded to, but under special circumstances, or from a suggestion of misapprehension.

The defendants, upon the second argument, had, as in the first, relied upon the points stated in their petition, which were,

1. That *Mary Cruger*, in whose right her husband, the defendant *Henry Cruger*, claimed, was an infant at the time of making the said order.

2. That four of the persons named in the title of the said cause were not parties thereto, and in no way bound by what was so done.

3. That *William Bard* and *Henry Cruger*, named in the title of the said order, were not and are not parties to the said suit, and that the suit had abated, by their intermarriage,

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*against their wives, and was not revived, which is irregular, and the order not binding on them.

4. That the appraised value of the said two farms is less than one half of their real value, and that the order for confirming the same was agreed to from an ignorance and misapprehension of their real value, and from an anxiety to get possession of what was not disputed, the withholding of which, until a final decision could be made, was taking an undue advantage of the situation of the petitioners.

5. That Mrs. *Towers*, afterwards Mrs. *Maitland*, never was a party to the said suit, nor were her heirs regularly parties to the suit, nor are they bound by any proceedings therein.

This suit, in its origin, was an amicable one. All the proceedings, until it assumed an adverse complexion, were entered by consent, without the actual interposition of the court, and the whole were moulded, by the joint concurrence and joint efforts of the parties, to the form in which they appeared on the minutes.

It was therefore important, *in limine*, to ascertain how far the parties assenting were legally competent to give an assent binding upon them, and whether such assent was to be inferred from their acts.

This required a succinct view of that part of the pleadings relating to them.

[Here the chancellor stated the proceedings which had taken place in the cause.

There were further proceedings, which had no bearing on any other than the fourth point, and which having no necessary connection with the others, its consideration, and the facts connected with that point, were postponed, until it should be discovered, from a disposition of the other points, whether it would be necessary to examine them.

As to the first point, that *Mary Cruger* was an infant at the time of making the order:

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*It appeared from the admission of the parties, that *Mary Cruger* was born the 24th day of *September*, 1782. On the 21st of *May*, 1803, the order for confirmation of the master's report was entered, and on the 28th of the same month an order of reference was made, which was discharged by the order of the 21st day of *May*, 1804. The defendant *Mary* came of age on the 23d day of *September*, 1803. Of consequence, all the orders prior to that of the 21st of *May*, 1804, were made during her non-age.

The Court of Chancery gives extrajudicial directions to protect the interests of infants, which are peculiarly the objects of its care and attention. (2 *Vesey*, 484.) It will hear a person on the subject of their interests, as *amicus curiæ*. It will not usually make a decree by consent, where infants are concerned, without referring it to a master to inquire whether it is for their benefit. (1 *Bro. C. C.* 488. 2 *Atk.* 377.) I'

holds that he can admit nothing; and I was of opinion, from the scope of authorities, from the course of the practice, and from the duty imposed on the guardian to avail himself of the best defence the nature of the case will admit of, that the guardian must answer under oath. The complainant may, with the leave of the court, dispense with the oath: but as the forms of the court, and the interest of the infant, require it, I was inclined to think it could not be deemed an answer, so far as respects the infant, without the usual solemnity of an oath, or its legal equivalent, an affirmation; for if it is not sworn to, it has been held that it ought to be quashed. (1 *Hind. Pr.* 205. *Prac. Reg.* 183.)

To infants no *laches* is imputable, and they may, therefore, in any stage of their nonage, avail themselves, in many instances, of matters on which adults would be concluded. But here the defendant *Mary* was a *feme covert*. She had an adult husband, and this situation is so far respected in the Court of Chancery, that if a guardian had not been appointed before the coverture, none would have been appointed afterwards. Her husband *had waived every informality which can affect him, and the order complained of was entered, by consent, after she came of age. This was an affirmation of all the preceding acts, and she could not be permitted to avoid an act formally and deliberately done by her counsel, without showing that it was done against her consent, which was not pretended.

The second objection was, that four of the defendants named in the cause were not parties thereto. With this the fifth objection, that neither *Betsey Towers* nor her heirs ever were parties, was so connected, as rendered it proper to consider those objections together.

The answer of *Betsey Towers* was put in for her, by *John Nixon & Co.*, by virtue of the letter of attorney to *John Nixon* and *David Walker*, jointly. It did not appear that they, either of themselves, or with others, constituted a copartnership under that firm. If that had been the case, it is by no means a necessary consequence, even in the former case, that the power given to them jointly must attach to the firm under which they were described for commercial purposes; but if it did not comprehend others—if the execution is to be strictly tested by the power, it was incompetent, in its terms, to authorize the putting in an answer, in the manner in which this has been put in, and on this ground it resolved itself into a question of substance; for the intent of the principal, as to be collected from the letter of attorney, was to avail herself of the joint care and attention of both her attorneys; to repose upon the united exercise of their judgment, as well as upon the responsibility of each. But the admission of the firm would so far defeat that intent, as to enable either of them to execute the power, without the agency of the other, or even a stranger to the power, as one of the firm might be, could in that case have executed it.

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Besides, the establishment of a firm is merely commercial. It is derived to us from the law of merchants, *and relates only to matters connected with that law; but it cannot extend to proceedings having no connection with commerce. Here the act performed had no connection, either immediately or remotely, with trade. It therefore appeared to me, that the legal intendment was clear, that it was confined to the attorneys named, jointly, and that by them jointly the answer must have been put in to bind their principal, if under the power she could by them have been bound at all by their answer. It cannot be collected from the answer, that the attorneys united in putting it in.

Another objection was taken from the terms in which the letter of attorney was conceived. The general power contained in it, is to act in the management of the proportion of *Betsey Towers*, of the estate of her deceased father, *Nicholas Cruger*, agreeably to his will, as they shall see needful and necessary; and also for her and in her name, to ask, demand, sue for, &c. These terms do not embrace the power of binding the principal by an answer. They are only calculated to empower the attorneys to manage the ordinary business of the estate.

I have not been able to discover any legal principle, which will establish that a general power of this kind will warrant the putting in an answer. The settled practice of the court is decidedly at variance with it; for if a defendant is at a place which renders it inconvenient for him to appear before a master, a *dedimus potestatem* is issued to take his answer; and if it is necessary, even after consent, to obtain the leave of the court to dispense with an oath, it would seem to require prerequisites, at least as formal and efficient, to subject the interests of a defendant to a decision of the court, without the personal answer of the defendant, in a case in which the answer is the avowed basis of proceeding.

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In an anonymous case in *Peere Williams's Reports* (1 *P. Wms.* 523.) it was said, if there had been a general letter of attorney to appear and defend suits, the court *would have ordered the attorney to appear for the principal; but it was there held that an answer without oath was nothing, and the motion was denied.

Before the 27th of *April*, 1748, it was, it seems, not unusual, in the *English* Court of Chancery, to take answers before the masters, or commissioners, without the defendant's subscribing them, though the signature of counsel was then requisite, and the answers were taken from the defendants personally. (1 *Hind. Pr.* 20. 2 *Atk.* 290.) By a rule then entered, the signature was superadded; but there is no intimation in any of the books that, previous to that period, the personal answer of the defendant could be dispensed with.

At the time of filing the bill in this case, *Betsey Towers* was the wife of *Alexander Maitland*, for the bill was filed the 424

18th day of *May*, 1801, and they married about the beginning of that month.

The bill filed against her as a *feme sole* could not bind her interest as a *feme covert*, or that of her husband, unless they had estopped themselves by some act in court. There was, however, no other act attributed to them by the complainants, than the filing their answer by *John Nixon & Co.*, and the proceedings founded thereon, which I have already given my reasons for concluding that it ought not to affect them.

From these views of the subject, I was of opinion, that *Betsey Towers* never was a party to the suit; that the answer filed for her was irregularly obtruded on the files, and could not be considered as her answer.

In tracing the proceedings for reviving the suit, it appeared to me proper to consider the influence of this state of things on it.

The complainants having intermarried on the 17th day of *November*, 1801, a bill of revivor was filed in consequence thereof, on the 26th day of *March*, 1802, the original bill having become abated by such intermarriage. (10 *Ves.* 31.)

The bill of revivor states the death of *Betsey Towers*, *and that the defendants, *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers*, were her children and heirs. To this bill their answer was filed by *Isaac L. Kip*, their guardian, who was appointed such on the 14th day of *April*, in the same year; on the day preceding which, an order was entered to revive the suit against them, on a suggestion of the death of *Betsey Towers*. This being before the appointment of a guardian, the order for the revival appears to have been entered against the infants, in a suit actually abated by the intermarriage of the complainants, before they had been brought in by process, and before they could possibly be legally apprized that they were required to appoint a guardian, whom, though infants, they might have been of competent age to nominate, and thus disregarding the event which had so absolutely and totally abated the suit, as to require a bill of revivor to resuscitate it, and providing for an object comparatively less influential on the fate of the suit, the succession of the defendants to the rights of their mother, which might, if the absolute abatement, arising from the intermarriage of the complainant, had not accompanied it, have been pursued without a formal revival. But under the existing circumstances, the order for the revival, as against the heirs of *Betsey Towers*, had no suit to which it could attach, the defendants not having been brought in by *subpœna* on the bill of revivor, and no person having, in that stage of it, appeared for them.

The order of the 24th day of *August*, 1802, was said to have been grounded on that of the 13th day of *April*, preceding, though it was described as of the 14th, and *as that*, by which the suit stood revived. It was expressly granted, on proof of

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the service of the latter on *Thomas Smith*, the clerk in court of the defendants, and upon reading and filing his certificate, that the defendants have not put in their answer, nor signified their disclaimer of the matters in controversy in the terms prescribed by the 6th sect. of the act of the 3d of *April*, *1801. (sess. 24. c. 133.) and thereupon orders that the complainants may cause the appearance of *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers* to be entered; and that the answer of *Betsey Towers* be taken as and for their answer; thus assuming *Mr. Smith*, as representing them in court, though by the abatement of the original suit, by the coverture of the complainant *Ann*, the connection between it and him had been completely dissolved; and founding the order for an appearance, and the abiding by the answer, merely on the service of the order, that the suit be revived on suggestion of the death of *Mrs. Towers*.

This would have been proper on the death of *Mrs. Towers* only, if her answer had been regularly put in, and no other contingency to interrupt the progress of, or abate the suit, had occurred; but in the present case, the combination of two events, one operating as an absolute abatement of the suit, and, if standing alone, compelling the complainants to file a bill of revivor, the other a qualified abatement, arising from a mere succession to rights, by the act of God, had been acted upon, as if the double contingency exempted the complainants from resorting to a bill of revivor, and exacting a new answer.

This again, in my opinion, concluded against the complainants, and appeared to be unwarranted by the established practice of this court; and I was clearly of opinion, that the defendants, *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers*, were never parties to the suit.

The question respecting the filing the answers previous to the bill, I was rather inclined to think was to be determined on the point, that it was a clerical mistake. The parties had united in carrying on an amicable suit, their measures were taken in concert, and the probability is, that the bill and answer were concurrent acts. At all *events, if it was a mistake, I thought it ought to be corrected, or overlooked.

This cause was conducted to a certain stage, by the mutual coöperation of all the parties in interest, evidently by consent; and I well recollect, after I came into the Court of Chancery, that the orders which were taken were always preceded by those kind of suggestions usual in amicable suits; and as the mode of introducing the parties into the suit never came in one collected view, the acts of the court were always founded on the state of the proceedings, at the point at which its powers were required to be exerted, without any retrospect to their origin or progress, beyond the precise stage which was necessary to be disclosed, to show the propriety of the order. Hence, though there is a long detail of the proceedings of the

court, the whole were modelled by the counsel, so as to adapt them to the views of the parties, until the collision of their interests interrupted the harmony which had subsisted between them; and even after that period, the order for a reference to a master was discharged by their joint consent.

It was, however, essential in this case, to bind the interest of the parties, who were infants, that the reference should have been acted upon, as the discharge of the reference was merely by consent, and without an appeal to the court for the exercise of its discretion on the occasion.

The intent of the testator was to have his estate equally divided into three parts, and to vest in his widow a right of electing which portions of his property she would take, to the amount of one third in value.

If at any time before the election was perfected, and the subsequent proceedings consummated, a palpable disproportion should be so manifest as evidently to create a great and inequitable disparity, I had little doubt but that it would have been proper to equalize it, as otherwise, the benefits intended to be given to the devisees *would, in their relative proportions, be deranged, and the intent of the testator defeated.

In this case, circumstances were disclosed, which rendered the correctness of the appraisement questionable. Though a considerable share of discernment was acknowledged to be possessed by the appraisers, and not a doubt was entertained of their integrity, the probability was, that a rapid rise in value of the estate of *Rose-Hill* had contributed to its incorrectness.

If the parties had been in a situation to make it an object of inquiry, the expediency of referring it for that purpose might have been a question; it could be none at the time of my decision.

The letting the cause stand over to enable the complainants to bring in parties, might have been a proper order, in other circumstances of the cause. As it then stood, I was to decide whether the order of the 21st of *May*, 1804, ought to be supported. I was of opinion it could not. It was not binding on the defendants, *Ann*, *Peggy*, *Mary* and *Catharine Towers*. If it was not on them, the interests of all the parties were so intimately united, that the reciprocity of those interests seemed to require that they should be supported, so far as respected the present suit, or that they should fall together.

The defendants, *Ann*, *Peggy*, *Mary* and *Catharine Towers*, by *William Bayard*, *Thomas Cooper* and *Charles Wilkes*, who were appointed by this court their guardians, on the 17th day of *February*, 1806, proffered their assent to all the proceedings; unless it should appear that *Rose-Hill*, and the 4 3-4 acres opposite thereto, were undervalued; in which case they conceived it for the interest of the infants to have it reappraised. No other of the parties joined in this proposition; but it was a conditional one, and if available, it must be by the assent of

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the other parties. It could, therefore, have no influence on my decision; for if the proceedings could not bind the defendants, whose guardians made *the offer, without their affirmance, it was a valid reason for the other defendants to resist the progress of proceedings, which, while it might embarrass, could not contribute to settle their interests definitively.

Upon the whole, under whatever aspect the business was viewed, it concluded, very forcibly, in my opinion, to the avoidance of the order in question. It was made under circumstances which would not warrant it, and it ought to be vacated. Such being my opinion, it became unnecessary to pursue the investigation of the subject matters of the 3d and 4th points, which were made in the cause.

I reserved the question of costs for further consideration, if they should be claimed.

A petition of the defendants by their counsel, presented in May term, extended the application to the avoiding all the proceedings subsequent to the filing of the bill, as to the defendants, *Ann Towers, Peggy Towers, Catharine Towers and Mary Towers*, and the proceedings subsequent to the answers of the other defendants, after the filing their answers. For the reasons already given, I was of opinion that the order might be enlarged so as to embrace those objects. And I accordingly directed such an order to be entered.

The cause was then argued by *Benson and Harison*, for the appellants; and *Pendleton and T. A. Emmett*, for the respondents. The argument lasted eight days, and the counsel on both sides displayed great learning, ingenuity and eloquence; but the facts discussed and authorities cited are so fully examined in the opinions delivered by the members of the court, that it is not requisite to state the arguments of counsel, further than to present the points of law raised, and the cases cited.

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For the appellants, the following cases were cited: 1. As to the alleged irregularities in the proceedings in *the court below, 8 *Atk.* 439, 440. 6 *Ves. jun.* 285. 10 *Ves. jun.* 441. 1 *Vern.* 400. 3 *P. Wms.* 195. 2 *Eq. Cas. Abr.* 419. *Mitf. Plead.* 57. 71, 72. 1 *Dickens*, 8. 1 *Vern.* 487. *Prec. in Ch.* 83. 1 *Atk.* 73. 1 *Vern.* 140. *Bunb.* 200. 2 *Atk.* 510. 1 *Ves. jun.* 417. 2 *Atk.* 15. 3 *Atk.* 110, 111. 4 *Bro. Ch. Ca.* 122. (old edit.) 6 *Bro. P. C.* 129. 1 *Dick.* 31. 4 *Vin. Abr.* 147. s. 2. 2 *Eq. Cas. Abr.* 1. 1 *Ves.* 182. *Mitf.* 55, 56. 1 *Har. Ch. Pr.* 128. *Str.* 708. 2 *Eq. Cas. Abr.* 238. s. 18. *Mitf.* 26. 1 *Ch. Rep.* 252. 1 *Har. Ch. Pr.* 289. 1 *Dick.* 22. 1 *Bro. Ch. Cas.* 484. 1 *Dick.* 28. *Select Cas. in Ch.* 129.

2. That the trust devolved on the Court of Chancery, 1 *Bro. C. C.* 81. *Saunders on Uses*, 116. 2 *Fonb.* 173. in note 3 *Ves.* 87

3. As to the right of election by *Ann Rogers*, 9 *Vin. Abr.* 458. s. 5. *Elect. A.* 2. *Hob.* 174.

4. That no change in the value of the property subsequent to the election ought to be regarded, but that the valuation ought to stand, 2 *Powell on Contracts*, 61. 79. 2 *Vern.* 280. 1 *P. Wms.* 61. 2 *P. Wms.* 410. 1 *Bro. Ch. Cas.* 156. 2 *Bro. Ch. Cas.* 17. 1 *Fonbl.* 132.

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On the part of the *respondents*, the following cases were cited: 1. As to the irregularities in the proceedings in the court below, *Mitf.* 144. 3 *Bro. Ch. Cas.* 365. 1 *Bro. Ch. Cas.* 229. 2 *Atk.* 290. 3 *Bro. Ch. Cas.* 25. 7 *Ves. jun.* 11. 11 *Ves. jun.* 306. 2 *Bro. Ch.* 127. 1 *Atk.* 291. 3 *Bro. Ch. Cas.* 392. 400. *Finch*, 258. *Wyatt's Pr. Reg.* 13. 223. 212. 226. 1 *Vern.* 31. 1 *Dick.* 92. 1 *Har. Ch. Pr.* 225. 2 *Har. Ch. Pr.* 133, 134. 2 *P. Wms.* 387. 2 *Atk.* 377. 2 *Freeman*, 127. 2 *Vern.* 342. 224. 2 *Atk.* 520. 529. 1 *Ld. Raym.* 600. 2 *P. Wms.* 401. *Mosely*, 68. 3 *Bro. Ch. Cas.* 340. 1 *P. Wms.* 737. in note. 2 *P. Wms.* 119. 9 *Ves. jun.* 59. 2 *Vern.* 392. 429. 1 *Atk.* 420. *Ambl.* 197. 2 *Ves.* 206. 2 *Atk.* 529. 1 *Vern.* 31. 1 *Har. Ch. Pr.* 721. 2 *Ves.* 23. 1 *Ves.* 469. 1 *Atk.* 570. 2 *Har. Ch. Pr.* 232. *Gilb. Eq. Rep.* 230. 3 *Atk.* 603. 11 *Ves. jun.* 152. 163. *1 *Dick.* 310. 1 *Ves.* 313. 2 *Ves.* 484. *Prec. in Ch.* 543. *Hinde*, 228. 240, 241. *Parker*, 61. 2 *Atk.* 290. 6 *Ves. jun.* 171. 185. 10 *Ves. jun.* 441. 12 *Ves. jun.* 159.

2. As to the performance of the trusts, 7 *Bro. Ch. Cas.* 318. 2 *Atk.* 58. 8 *Ves. jun.* 337. 2 *Ves.* 125. 2 *Str.* 915.

3. As to inadequacy of the valuation, and its effect, as evidence of an undue advantage taken, 2 *Bro. P. Cas.* 16. 1 *Bro. Ch. Cas.* 287. 4 *Bro. Ch. Cas.* 198. 3 *P. Wms.* 315. 1 *Vern.* 32. *Fonbl.* 209. 9 *Ves. jun.* 246. 12 *Ves. jun.* 373.

YATES, J. The following questions arise in this case; 1. Whether the infants were properly before the Court of Chancery so as to be bound by the decretal order of the 21st May, 1804, confirming the appraisement; 2. If they were properly before the court, whether the setting aside that order, as to all the respondents, was fit and proper on the ground of mistake in the appraisers, surprise on the respondents, or imposition or fraud of the complainants. I shall not, on the first question, take up all the proceedings, and examine the merits of every objection in detail;—this would be an unnecessary task; many of them, being mere matter of form, were cured by subsequent acts, and others, not noticed in season, were waived;—but shall content myself in selecting such as appear of sufficient weight to have influenced the chancellor in granting the order, as to the infants, from which the party has appealed.

From the manner in which this cause was first commenced,

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it appears that the rules of the Court of Chancery have not been strictly adhered to by either party; but the interest of infants being implicated, it required the proceedings to be conducted with the greatest care and vigilance, to secure the effect of the application to the court, and in every step connected with their rights, to have committed them exclusively to the direction of the *chancellor, whose duty it is to protect those rights in every stage of the cause.

On an examination of the letter of attorney of *Elizabeth Towers* to *John Nixon* and *David Walker*, it does not appear that they were authorized to answer in chancery; it is confined to the management of her proportion of her father's estate; and if even it had contained sufficient power for the purpose, the joint signature of *John Nixon & Co.* is improper, and the answer could derive no legal authenticity from it; but the signature of Mr. *Hopkins*, as solicitor, (she residing in foreign parts,) might legalize the answer in the view of the court, if, at that time, the letter of attorney had not been virtually revoked by her intermarriage with *Alexander Maitland*. She could not be called upon to answer by a wrong name, or be made a party without her husband, who became entitled to her proportion of the personal estate by the marriage; those parties, consequently, never were in court, and I cannot discover in what manner the suit could have been revived against her infant children; yet this was done, and the order entered for that purpose is founded on a suggestion, that *Betsey Towers*, one of the defendants, answered the bill, after which she died, and that *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers* were her only children and heirs, and that she had no executor or administrator, or other representative, except the said children, when in truth Mrs. *Maitland*, named in the order *Betsey Towers*, had left *Francis Claxton*, *William Mitchell* and *William M'Cormick* her executors and the guardians of her children; and though they were not made parties, still, as executors, they retain their remedy for the personal estate left by her. The doctrine contended for, on the ground of want of information of their marriage, and subsequent death of Mrs. *Towers*, cannot, in this instance, be countenanced. It may with propriety be applied to acts of colonial governments done in the name, and after the death of the sovereign *previous to information of his death; for as those are acts in the preservation of which the community are interested, sound policy requires that rights thus obtained should be left in the undisturbed possession of the claimants. This appears to me to be the ground of the decision at the circuit, in the ejectment cause in *Ulster* county, cited by the appellants' counsel, when a patent thus granted, after the death of King *William*, was produced as evidence of title; but I think the impropriety is evident of extending that rule, under

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the circumstances already mentioned, to the infant children of Mrs. *Maitland*.

It is an unquestionable rule that infants cannot bind themselves by their own acts, or by consent, even by guardians, unless it be rendered manifest to the chancellor that they would be benefited by it. Several of the other respondents were infants when the proceedings, in many instances, were by consent. The investigation of those, however, may become unnecessary, from the result of the discussion of the second question proposed, which I shall therefore proceed to examine.

Whether the setting aside of the order of the 21st of *May*, 1804, was fit and proper, as to all the respondents, on the ground of *mistake in the appraisers, surprise in the respondents, or imposition or fraud of the complainants*.

It is alleged that the appraisement of *Rose-Hill* farm, containing ninety-two acres of land, subject to a lease during the lives of Mr. and Mrs. *Gates*, at 50,000 dollars, and the land opposite, at 2,500 dollars, is inadequate to the real value.

The persons appointed appraisers of this property stand before this court unimpeached. The charge of imposition or fraud cannot be attributed to them. If the amount is inadequate, they have been mistaken in the value, and it must be deemed an error in judgment, to which a rigid adherence to theoretical calculations, as to the value of encumbrances, without *due regard to the advantages of situation, has, perhaps, in no small degree, contributed.

From the testimony before us, it appears that the highest unencumbered value of *Rose-Hill* farm, agreeably to the calculations made on the principles supposed to have been adopted by the appraisers, was about 91,000 dollars, making a difference of upwards of 4-9ths for the two lives, the one aged 63, and the other 75, with which it was encumbered; far exceeding any amount I can possibly conceive the real existing difference to be. This system of calculation will unquestionably, I think, admit of an age in human life to which an estate may be subjected, nearly, if not equal in value, to the fee simple which would render the reversion not worth any thing, a position wholly inadmissible, and at war with common sense. It cannot reasonably be imagined that the encumbrants would have charged 41,000 dollars to extinguish their interest in the premises: I am persuaded it would be nearer the true value to estimate it at half that amount. In that case, the unencumbered valuation would be 70,000 dollars, instead of 50,000 dollars; and yet this is a sum, from the testimony before us, certainly below its real value; but, independently of the offer made by the respondents of 100,000 dollars, compare it with the average of nearly all the sales in evidence, and it falls short a considerable sum; but take those made by *John Hone*, about 600 yards farther from the city, on the same road, at a price exceeding an average of 2,000 dollars *per acre*, and it will be found,

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after a reasonable deduction for the encumbrance, to be grossly inadequate, and that, too, at a period of a few days previous to the date of the order of the 21st of May, 1804, and at a time when the appointment was subject to the rule of reference to a master, a circumstance tending to show the situation of the respondents, although doubtful, yet ignorant of the real value of this estate, and at that time reluctantly assenting to the appraisement, under a mistaken *supposition that the valuation, although low, was more correct than it really appears to be. And I cannot resist the impression on my mind that they were, in some measure, influenced by the peculiar situation in which they were placed, after the refusal of the appellants to relieve the necessities of some of them, as appears by the testimony of *James Palmer, jun.*, or make a partial division of the estate, without their consent to the *will*, the *appointment*, and *Mrs. Rogers's choice*, as stated in the correspondence of *Bertram P. Cruger*, one of the respondents, and the appellant *William Rogers*. I am not prepared to say that *Mr. Rogers*, on this occasion, was actuated by fraudulent designs, or any other motives than a desire to coerce the division of the estate, acquainted with the value of *Rose-Hill*, and subject to the feelings too frequently produced by family disputes; but I do not hesitate to declare, that in the right of his wife, as sole acting executrix of *Nicholas Cruger*, his conduct was not warranted by the will.

The testator ordered his executors to pay each of his children their separate shares, on their arriving to the age of 21 years, and to allow sufficient for their education and support during infancy. This refusal, therefore, to say the least, was illegal, and must, in some measure, have induced a compliance with the confirmatory order, and, consequently, in its operation, have been oppressive to the respondents; and I think it may be depominated a species of fraud, attended with stronger circumstances than are requisite to constitute the third kind enumerated by Lord *Hardwicke*, in the case of *Chesterfield v. Jansen*, (2 *Ves.* 155.) The respondents certainly, by their counsel, at the earliest period, evinced a doubt or dissatisfaction in relation to the appraisement, or why, only eight days after filing of the report of the appraisers, enter this rule of reference to a master, whereby each party should be at liberty to except to all or any of the valuations contained in it, touching which the master *might examine witnesses, and also inquire into the whole amount of the estate, together with the amount and particulars of the property elected by the appellants. As this rule was by the consent of the counsel on both sides, and the report of the master thereon must have been intended to assist the chancellor in the completion and ultimate confirmation of the appraisement and election, it became equally the duty of both parties to cause this report to be made; and the neglect or omission of the counsel of the respondents cannot be construed into such an unqualified acquiescence, as to vest the property

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so elected by the widow, in her. It still remained open to objections, and the appointment subject to impeachment, on the grounds now taken by the respondents, and could not be deemed complete, until the investigation and report of the master, and confirmation of the chancellor had taken place. In that imperfect state it continued, until the order by consent of the 21st of May, 1804, was entered, to which, it appears, the respondents, under the peculiar circumstances already mentioned, assented. The case of *Pursey v. Desbouterie* (3 P. Wms. 315.) is in some measure applicable, where a daughter of a freeman of London accepted of a sum of money, as a legacy, in extinguishment of her orphanage part, and executed a release, though she was told she might elect which she pleased; yet it was held, if she did not know, she had a right first to inquire into the value of the personal estate, and the quantum of her orphanage part, before she made her election; and this was so material that it might avoid the release.

I cannot think that the subsequent acts of some of the respondents to obtain a partition under the statute, can be considered a sufficient confirmation of the appraisement and election, so as to vest the property in Mrs. Rogers; but admitting, for a moment, that the property elected by her had vested at the time of such election, and that on an investigation before a master, it had been found to exceed one third, either by mistake in the appraisers, or otherwise, *would Mrs. Rogers retain that property, and the children be obliged to accept of a pecuniary compensation for the difference? This course would be wholly subversive of the testator's intention expressed in his will; whereby the amount, of such part or parts of his estate, real and personal, or either, as she might choose, is so limited, that on a fair and equitable valuation or appraisement of the same, the part or parts she shall so choose, shall not exceed together the value of one third of his real or personal estate. Such appraisement and election, therefore, could not vest the property, nor could the order of the 21st of May, 1804, under the peculiar circumstances of this case, remove the necessity of a reference to a master by the chancellor, for the purpose of enabling him to effect a fair and equitable division of the estate, between the widow and the children, according to the true intent and meaning of the testator. It is consequently on the ground of a mistake in the appraisers, and ignorance and surprise on the part of the respondents, that, in this view of the subject, they will be entitled to relief. The result of my opinion, therefore, is, that the order of the 18th of September, 1807, setting aside all the proceedings whatsoever against *Elizabeth Towers*, the mother of *Ann Towers*, *Peggy Towers*, *Catharine Towers* and *Mary Towers*, who are infants, and setting aside all the proceedings in this cause against the other defendants, subsequent to their putting in their answers to the bill of

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VAN NESS, J. In the consideration of this cause, the following are the leading and important questions which are presented for decision :—

1. Can the decree or order of the 21st *May*, 1804, and the proceedings upon which it is founded, be set aside, on the ground of fraud, mistake, or irregularity, as against all the respondents, or any of them?

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*2d. If the proceedings are regular, as to some of the respondents, but defective as to others, are the whole thereby vitiated?

1. The discussion of the first question, in my view of the subject, is the most important in the cause. It involves a construction of that part of the will upon which the rights in severalty of the appellants depend, and that construction being once ascertained, it will be found to have an almost controlling influence upon every question that arises. To the correct decision of this point, the following parts of the will are necessary to be stated, and particularly attended to, viz.

"I order and direct my executors, herein after mentioned, to make a full and perfect inventory of my estate, as soon after my death as with decency and convenience it can be done.

"The rest and residue of my estate, both real and personal, I will and devise in manner following, that is to say, I give, devise and bequeath one third part thereof to my beloved wife, *Ann Cruger*, and to her heirs and assigns for ever; and it is my will that my said wife may, if agreeable to her, take the said one third part thereof out of such part or parts of my estate, real and personal, or out of either of them, as she may choose, so that, on a fair and equitable valuation or appraisement of the same, the said part or parts she shall so choose shall not together exceed the value of one third of my said real and personal estate, as above devised and bequeathed to her.

"I again devise and bequeath the remaining two third parts of my estate, both real and personal, to my children, sons and daughters, as well those of my first marriage as those of my second, (they being all equally near and dear to me,) to be divided share and share alike.

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"It is my will that my said executors, as soon after my death as my said wife shall choose, assign and convey to her the one third part of my estate, real and personal, *as herein before devised and bequeathed to her, and in manner and form as is therein mentioned."

In the construction of wills, the intention of the testator must always prevail, and that intention is to be collected from the whole will, "*ex visceribus testamenti*," and, if possible, full effect is to be given to every part of it. It is, perhaps, needless to remark, that when a will appears to have been legally executed by a person of sound mind and discretion, the distribu

tion which the testator makes of his estate must take effect, however unreasonable or improvident such distribution may appear to be. Courts of justice are to expound, not to make, wills. The right which every man has to dispose of his property after his decease, in such manner as he thinks proper, is founded in wisdom and good policy, and is secured by the laws of this and every other civilized country.

The will in question was executed about nine years before the testator's death, and when most, if not all, his children were infants. By that part which I have just recited he directs, and as the first act to be done after his decease, that an inventory of all his estate should be made by his executors. And here I will take occasion to remark that the appellants were competent to make this inventory, without the executors who refused to act; and this was equally proper and necessary, whether the appellants did or did not exercise the right of election given by the will.

The testator then devises to his wife (one of the now appellants) a third part of his estate, real and personal, and gives to her the right to take the same out of such part or parts of the estate, real and personal, or out of either of them, as she might choose, *so that, on a fair and equitable valuation, or appraisalment of the same*, it should not exceed the value of one third of the whole. It is further provided, in relation to the property elected, that as soon after the testator's death as the election should be made, that the executors should assign and convey the *property elected. The remaining two thirds of the estate is devised to the seven children; but it is to be noted that no conveyance is directed to be made by the executors to them. Under these devises, immediately upon the death of the testator, one third part of the real estate vested in the widow, and the residue in the children, the title thereto not being intercepted by any trust devise, directly or indirectly, to the executors. But in relation to the widow's share, she had a right, as soon as an inventory was completed, to convert the interest she held in common with the children into an estate in severalty, and thus, by her own act, to acquire a new interest, and to do what was equivalent, as between her and them, to an actual partition; and this, *by virtue of the will*, she had the uncontrolled power and right to do, without the aid or concurrence of the executors; for as no interest or property of any description was vested in them, they could communicate none to the widow. Her rights were derived from the provisions of the will itself, independent of the executors, who could neither modify, control, or abridge them, and who had no other agency in the transaction than to cause an appraisalment to be made, and to see that the part or parts of property elected by the widow did not exceed one third part of the value of the whole estate.

The testator intended to facilitate the exercise of this right

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of election, as far as he could, and never designed that it should be embarrassed or delayed, much less defeated, by reason of the infancy of his children. One great and important object of the testator was (for reasons with which we have nothing to do) to secure to his wife the means, if she saw fit to use them, of separating, according to her own will and pleasure, her part of the estate from that of the children. It is highly probable, however, that the testator supposed an appraisement would be made previously to the making of the election.

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The counsel on both sides have supposed that the *knowledge of the appraisement would have given the widow an undue advantage. I cannot, I confess, perceive any important advantage this would have given her; but however that may be, of this I am well satisfied, that it was never the intention of the testator that it should be concealed from her. How was she to limit her election to one third of the whole *appraised* value of the estate, if she had not the means of knowing the whole amount of that value? She would by that measure be obliged to grope, as it were, in the dark, without knowing, had her views been ever so pure and upright, whether the property elected would exceed or fall short of the amount to which she was entitled. If she exceeded that amount, how was it to be reduced? If she fell short, how was she to make it up? In the latter case, there might probably be no difficulty; but in the former, delays, embarrassments and disputes might arise, which, before they were terminated, might defeat the election altogether. The will clearly supposes the election was to be one single act. It will be seen, upon a moment's reflection, that if the appraisement had been submitted to the widow, the election would have been (as it was the wish and desire of her husband it should be) a plain, simple and easy operation. She would then have known to what extent she might go, and shape her election in such a way as to preclude all delay, and, what was of infinitely more consequence, all dispute. Whether I am right in this or not, does not essentially interfere with the conclusion I am about to draw, from what I have before said.

I have already remarked that the right to make the election accrued at any time when the widow chose to exercise it, after the death of her husband. I have also endeavored to show that the election having been made, the effect of it would be to convert the estate of the widow in common with the children, into an estate in severalty, and that independently of the executors, who, as they never derived any interest from the will, could impart *none to the widow. A necessary consequence from these positions, if they are sufficiently established, is, that a conveyance from the executors was not necessary to the completion of the widow's title. I consider the conveyance from the executors in the light merely of a further assurance, and as affording the evidence that the election had been duly and fairly made, and not as conferring upon the widow any new or

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additional right. But admitting, that to vest in her the legal estate, a conveyance from the executors was requisite, nothing is clearer than that she had a certain and indisputable equitable interest, which chancery would at all times have recognized and enforced, upon her application, by directing a conveyance to be executed. It will be seen in the sequel, that whether the estate derived from the election was a legal or an equitable one, the consequences will be the same. It is necessary now to examine, whether the appellants have exercised this right of election in such manner as to acquire a vested interest in pursuance of it.

By reason of the refusal of the executors to prove the will, and to take upon themselves the execution of any of the powers thereby vested in them, there was no person who could cause a valid appraisement of the estate to be made, or to execute any writing by which the widow could preserve the evidence of her election, and acquire a proper assurance of her title, in virtue of her election, if that were required. It became necessary for these purposes, *and for these purposes only*, to resort to the Court of Chancery. In pursuance of an arrangement made between the widow and some of the adults, and by the advice of able and learned counsel, an amicable suit was agreed to be instituted, wherein the appellants were to be the complainants, and the children of the testator were to be the defendants. This proceeding was for the benefit of the parties, who all had an equal interest therein.

The bill was filed accordingly, and the defendants answered it. The bill states all the material facts relating to the premises, which are admitted by the defendants. *The regularity of these proceedings is for the present not noticed. That forms another point in the cause, which I shall consider hereafter. For the present I will consider them as regular.

The appraisement contemplated by the will was completed, (but by order of the court was not made known to any of the parties,) and was filed on or about the 20th *May*, 1803. The election by the appellants was filed on the 17th *May*, in the same year, designating the parts of the estate chosen by her.

In consequence of the refusal of the executors to act, the execution of the powers and trusts contained in the will devolved upon the Court of Chancery, (for a trust is never defeated for the want of a trustee,) and that court was, to all intents and purposes, substituted in the room of the executors.

The appraisement, therefore, having been made by competent authority, and the election having been filed, the title became vested in the widow, and, in my opinion, absolutely; but at all events, in such a manner as to entitle her to a conveyance, or such other writing, as would be competent to render her title complete. It has been insisted upon, and not without effect, that inasmuch as it was unknown whether the property designated in the election, did or did not exceed one third of

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the value of the estate, that the election was not perfect until the Court of Chancery should previously examine into that fact, and that, until the election should receive the sanction of the court, it was not complete.

Upon the fullest reflection, I am satisfied, that the validity of the election cannot depend upon that circumstance. I have before observed, that the difficulty arising from the contingency that the property elected might exceed one third of the appraised value of the estate, is created by the order of the court directing the concealment of the appraisement from the appellant; a measure never contemplated by the testator, but which, if contemplated, *could never affect the validity of the election. If the title was never to vest until the chancellor confirmed and sanctioned it, the consequence would be, that the widow might be driven to make several elections, and thus, contrary to the fair interpretation of the will, delays would be incurred, which might defeat the election, and disputes and litigation would be engendered, which the testator studiously endeavored to avoid. The election could, therefore, never be avoided on this ground. What effect a gross and palpable mistake in the valuation of the property would have had, will be examined, when I consider another point in the cause.

Before dismissing this point, I will briefly state a few other considerations which occur to me on the subject of the election.

The part or parts of the property elected by the widow, the will provides, shall not, upon a fair and equitable valuation thereof, exceed one third part of the estate. Hence it has been inferred, that until an appraisement was made, the right of election did not attach, but that, at all events, no estate was acquired under the election, until it should be confirmed by the trustees. But the very terms of the will import that the election might be made the moment after the appraisement was completed; and if so, the exercise of the right necessarily vested the estate, and this is of the nature and essence of the right, in all cases where an estate is to be acquired by election. The appraisement which was requisite to be made, in order to determine whether the part elected did or did not exceed the value of one third of the estate, is a matter of subsequent arrangement and inquiry, but can never operate to defeat or divest the estate which had been already actually acquired, on making the election, unless on the ground of fraud. The right of the widow to the property elected (or, in other words, her estate in severalty therein) began by the election. She was bound by that election; and if she was bound, nothing is clearer, *than that the children were bound also. The election fixed and ascertained her separate interest, and cannot be set afloat by any question about the appraisement, which might subsequently arise. For these reasons my opinion is, that upon principles of sound construction, and according to established rules of law, the widow acquired a vested legal estate, but, at

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all events an equitable estate in severalty, by virtue of her election, and as a necessary result, the estate thus acquired became vested the moment the election was filed. *IN ERROR.*

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I have taken some pains on this part of the subject, on account of its very great importance in forming a correct opinion on the remaining questions in the cause.

I will now, as briefly as the nature of the case will permit, proceed to consider whether the decree of the 21st of *May*, 1804, can be set aside on the ground of fraud, mistake, or irregularity in the proceedings on which it is founded.

And first, as to fraud. On this part of the subject, I will detain the court but a few moments.

Fraud is never to be presumed. It is always to be made out, either by positive proof, or by the disclosure of such facts and circumstances as are irreconcilable with good faith and the principles of morality. Many things may be illiberal, reprehensible, and, perhaps, even dishonorable, which will not in legal signification be deemed fraudulent, so as to avoid a contract. The evidence to make out the charge of fraud against the appellants, principally relied upon, is, that large sums of money in the hands of the appellants, due, as is contended, to the respondents, was improperly and oppressively withheld, whereby they were forced to assent to the order in question by an undue and illegal advantage which the appellants took of their necessities.

Undoubtedly, if this charge was supported, their consent to the order would not be obligatory upon them. But after all that has been so ably urged upon this subject, *I look in vain for such evidence in support of the charge, as a court of justice is bound to demand. I can see a want of courtesy and of a spirit of accommodation; I can perceive a good deal of that acrimony and hostility which controversies of this kind seldom fail to produce; but I cannot perceive the formation of a deliberate plan to drive the respondents into an agreement, which nothing but their necessities, occasioned by the improper conduct of the appellants, could have induced them to accede to. They were entitled to large and liberal fortunes under the will in question, and, in addition to which, they inherited a very large estate, which did not pass under the codicil, on account of a defect in the execution of it. It is impossible for me to believe that, under such circumstances, the necessities of the respondents induced them to submit to the terms of this order, or any other terms which were not reciprocal and proper.

Has there been such a mistake in the valuation of the *Rose-Hill* estate, as that the respondents can be relieved on that ground?

I have, in the former part of my opinion, endeavored to show, that the election vested the estate elected in the appellants, and that, as they were obliged to abide by that election, the respondents were equally bound to acquiesce in it. The election

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The value of *Rose-Hill*, at that period, and at no other, is, then, the proper subject of inquiry. The will clearly points to that event, as the time in reference to which the valuation of the estate was to be made. Indeed, this is a point which ought to have been conceded, because it is too plain to be controverted.

What, then, was the value of *Rose-Hill* on the 17th of May, 1803?

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-- If the respondents are to be relieved on the ground of a mistake in the valuation, at the time I have just mentioned, *it is not because of a trifling, inconsiderable inequality, for then a man would never know when he was or was not bound by his contract.

In the language of a wise and upright judge, who understood this doctrine, (Lord *Thurlow*,) "there must be an inequality so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." And he adds, "The principle then is loose enough—looser than I wish to be established in a court of justice."

I do not mean to go very fully into the evidence as to the value of *Rose-Hill*, at the time, when, according to my opinion, it ought only to be inquired into, to wit, on the 17th of May, 1803.

Three sworn appraisers, men of integrity and competency, have respectively testified, (for in that light the court are to consider their appraisement,) that in the month of *February*, 1803, they considered *Rose-Hill*, subject to the life-estate of General *Gates* and his wife, to be worth 50,000 dollars. There is no evidence, neither do I know that it is pretended, that between the months of *February* and *May*, there was any change in the value. This testimony must then be taken as establishing the value, until it is completely done away by other counter testimony; not by testimony which leaves the matter in doubt, but by such as to establish unequivocally that the appraisement of Messrs. *Isaac Low*, *Abijah Hammond* and *John Laurence* is grossly and manifestly inadequate.

The testimony relied upon is, 1. That arising from the affidavits of some of the respondents; 2. From the sales made of other property in the vicinity of *Rose-Hill*, cotemporary with the appraisement; and, 3. From sales made posterior thereto.

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*The affidavits of parties in judicial proceedings are to be received with great caution. I doubt very much whether, in this case, they ought to be received at all. But, taking them into consideration, what do they prove? As far as I can understand them, they furnish no other evidence than that the respondents have a sincere and perfect belief that there has been an undervaluation of this property, a belief founded, in a great

degree, however, upon sales made some considerable time after the election had been filed. *IN ERROR*

The evidence arising from the sales made about the time of the appraisement, and the offer made by *Titus* to *Kip*, in 1802, is equally uncertain and inconclusive.

The evidence derived from the sales, afterwards, and near the time of the order of the 21st *May*, 1804, a year after the election, is inadmissible, except in the point of view in which I shall presently consider it.

It is a rule as well settled as any that can be stated, that when a contract is made for the sale of real or personal property, without fraud, and which is obligatory on both parties at the time, that no change in the subsequent value of it, can be alleged by either party, for the purpose of rescinding it. If it depreciates, nay, if it be absolutely destroyed by conflagration, earthquake, or in any other way, the purchaser must pay the stipulated price. If its value is increased by the discovery of mines, the founding of a village or city, or by any other means, which occasion an appreciation in the value, no matter to what extent, the vendor is bound, on receiving the consideration-money, to execute a conveyance. This is a maxim in our law, known to every man, and it would be trifling with the time of the court to cite cases in support of its existence or reasonableness. The sales made subsequent to the election, about the time of the order of the 21st *May*, 1804, and afterwards, undoubtedly prove that at that period there had been a most rapid and unexampled rise in the value of property generally, in the neighborhood of the city of *New-York*. Whether, however, the astonishing prices for which property has been selling there furnishes us conclusive evidence of the intrinsic value of the property, time only can unfold.

The difference between the appraised value of *Rose-Hill*, and the probable increased value of it, in the spring of 1804, may, perhaps, in a great degree, be accounted for, from natural as well as adventitious causes. The yellow fever raged with great violence in the autumn of 1803. The prosperity of our country producing a most rapid increase of population, wealth and commerce, are circumstances which of themselves would explain the reason of the difference. At any rate, the sales I have last mentioned can never afford that kind of evidence which can countervail the testimony of the three appraisers.

But there are other considerations of great weight on this part of the subject. During the whole of the period which intervened between the filing of the appraisement and the making of the order of the 21st *May*, 1804, the respondents had an opportunity of excepting to the appraisement. They, however, did not except to it. In this interval of time, also, according to the evidence of Mr. *Benson*, negotiations were carried on between the counsel of the parties, and with the privity of the respondents, which finally terminated in the agreement con-

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tained in the order last-mentioned, in all which he says, "he never heard a complaint, suggestion or intimation, that any parcels or articles of the estate had been appraised too high or too low." Mr. *Harison* testifies to the same effect. After the appraisement, and for a long time thereafter, the respondents acted upon the order of the 21st *May*, 1804. They received property under it to a very large amount. They proceeded to take measures for making partition of that part of the real estate which fell to their share in consequence of the election and order. I cannot but consider, after all this, that they are bound (I mean the adult respondents at least) by the appraisement.

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*I come now to that part of the case which is the most difficult, and which presents the only questions about which I think there is much ground for a difference of opinion. I mean the regularity of the proceedings in the Court of Chancery, which terminated in the decree or order of the 21st *May*, 1804. And here, in common with this court and the parties, I have reason to lament the unavoidable absence of three of my learned brethren, by which we are deprived of the benefit of that aid which their experience and wisdom is so eminently calculated to afford.

I shall, in delivering my opinion on this part of the case, notice but a few of the many exceptions which have been insisted upon. Those not mentioned are to be considered either as having been sufficiently answered, or waived.

At the time of filing the original bill and answer, which was the 18th *May*, 1801, the respondents *Bertram Peter Cruger*, *Henry N. Cruger*, *Nicholas Cruger* and *Betsey Towers* were of age. The respondents *Catharine Cruger*, *Polly Cruger* and *Sarah Cruger* were infants. *Catharine* became of age the 7th *May*, 1802, and married the respondent *William Bard*, in *October* thereafter. *Mary* was of age on the 24th *September*, 1803, and was married to the respondent *Henry Cruger jun.* in *August*, 1802. *Sarah Cruger*, married to *William Heyward*, is yet an infant. All the adults, except Mrs. *Towers*, it is agreed, were regularly before the court. For the purpose of expressing my opinion, it is material only to consider whether the children of Mrs. *Towers* were improperly made parties to the suit, and whether Mr. and Mrs. *Bard*, and Mr. *Henry Cruger, jun.* and *Mary* his wife, were so far parties on the 21st *May*, 1804, as to be bound by the order entered on that day.

First, as to *William Bard* and his wife, and *Henry Cruger, jun.* and his wife.

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William Bard and *Henry Cruger, jun.* became interested *in the cause, in consequence of their respective marriages with two of the daughters of the testator.

In no case where a *feme sole* is a party defendant, and marries pending the suit, does the suit abate at law. It proceeds

as if she remained a *feme sole*. In equity it is necessary that the husband be made a party; sometimes he is made so by the mere order of the court, on suggesting the marriage; he may be made a party also by inserting his name in the proceedings; and there can be no doubt, if his name is thus inserted, with his consent, and he afterwards acts in the progress of the cause, in consequence thereof, in the character of a party, that he is bound by the decree and orders that shall be made. If a party, after an irregularity has taken place, consents to a proceeding, which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity. This is a doctrine long established and well known. *Consensus tollit errorem* is a maxim of the common law, and the dictate of common sense.

On the 23d *February*, 1803, after the marriage of Mr. *Bard* (but when his wife was still an infant) and *Henry Cruger, jun.*, whose wife was then of age, they for the first time appear in the proceedings. They then united in a petition to the chancellor for certain purposes, which it is not necessary here to mention, but which related to this cause. This was then their own act, and can be considered as done by them in the character of parties only. The Court of Chancery proceeded to make an order upon this petition, thereby considering them as parties, and they, not objecting to such order, waived all exception, afterwards, as to the form in which they were made parties.

On the 21st *May*, 1804, when all the respondents, except Mrs. *Heyward*, and the children of Mrs. *Towers*, were of age, the order was made for confirming the appraisement and election, and discharging the reference to the master, and for other purposes. This order was *made by consent, which the adults at all events were competent to give. In the title of the cause on this occasion, the names of *William Bard* and wife, and of *Henry Cruger, jun.* and wife, appear as parties. From this, I think the conclusion necessarily results, that if any irregularity existed in the proceedings previously to the 21st *May*, 1804, that the adults, voluntarily consenting to this order, waived them, and that the order was obligatory as to them, to the same extent and in the same manner, as if no irregularities had ever existed. I consider, then, that the only remaining question on this part of the subject is, whether the infant children of Mrs. *Towers* were ever regularly made parties.

Much has been said with respect to Mrs. *Towers* never having been regularly and legally a party. I pass over what has been urged on that subject, as not material, in my apprehension of the question relating to her infant children.

After the appellant *Ann Cruger* intermarried with *William Rogers*, the suit abated. It could be continued only by filing a bill of revivor, and this was the course pursued. At this time, Mr. *Maitland* and his wife were both dead, and of course

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were no longer parties. The infant children of Mrs. *Towers*, residing without the *United States*, succeeded to the interests of their mother, at least as to the reality, and, to be bound by the order of the 21st *May*, 1804, must have been parties to it. To make them so, the complainants proceeded under the provisions of our statute. And the question is, whether they were, in virtue of this proceeding, regularly brought into court?

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I have just stated, that after the marriage between the complainants, the whole suit abated, and a bill of revivor became requisites to continue it. To this bill it was necessary the respondents should answer, which (except the children of Mrs. *Towers*) they did. This was, in one sense, an original proceeding. The complainants *have proceeded against the children of Mrs. *Towers*, as if the original suit had not abated by the marriage between the appellants. But the answer of Mrs. *Towers*, admitting it to be good, was in a suit where Mrs. *Rogers*, then a *feme sole*, was the complainant. That answer can never "be deemed and taken as and for the answer" of her infant children, pursuant to our statute, in the revived suit, wherein both the appellants were complainants. This case is, therefore, not within the statute, and the children of Mrs. *Towers* consequently were not parties. But admitting the case to come within the statute, there is another objection to this proceeding. I cannot admit that our statute extends to the case of infants; nor do I believe that in any case, the answer of a deceased defendant can be made the answer of the representatives, provided such representatives are infants. The statute provides, that the rule or order to revive a suit against the representatives of a deceased defendant "shall be served on the adverse clerk;" and unless "they shall, within eighty days after such service as aforesaid, appear and put in their answer, or signify their disclaimer of the suit, and the matters in controversy therein, the plaintiff or plaintiffs may cause their appearance to be entered, and in such case the answer of the deceased person shall be deemed and taken as and for the answer of such representative, or other persons interested by the death of such person." Now the answer of the deceased is to be taken as the answer of the representative, provided certain things are not done. This can relate only to adults who are competent to perform those things. It is a fundamental rule of the Court of Chancery, that infants are not to be prejudiced by any *laches* which is not waived, after they become of age; and it is, therefore, that infants cannot be bound under a proceeding upon this part of the statute, which does not, in its terms, extend to them. The *children of Mrs. *Towers* were, therefore, never parties to this suit in any shape whatsoever; and, consequently, are not bound by the order of the 21st of *May*, 1804. To what time the proceedings as to them ought to be set aside, might, if it were material to the appeal-

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lants, present another question ; but as there can be no use in modifying the order appealed from in this respect, it is unnecessary for me to consider it. The appraisement was made after their mother's (*Mrs. Maitland's*) death, and after that fact was known to the appellants. Not being parties to the suit, they are not bound by the appraisement, and the appellants, as to them, must hereafter proceed as they shall be advised. But in order to support the proceedings against the infants, it has been urged that the petition presented by the guardians, on the second argument of the application for a rehearing, ought to have been acted upon by the chancellor. In this petition they offer to waive all the irregularities. The answer given to this by the chancellor appears to me to be satisfactory. The offer was coupled with certain reservations, which rendered it difficult, if not impracticable, to be carried into effect. But there is another, and, to my mind, a satisfactory answer. The chancellor, as the paramount guardian of all infants, is not bound to make any order, in the case of infants, which is not for their benefit. I am not prepared to say, that any order, which could be made upon this petition, would be for their benefit, under all the circumstances of the case ; I therefore lay this petition out of the question.

But, although the proceedings as to the infants are irregular, it by no means follows that they are not obligatory upon the other respondents, who, in the making the order of the 21st of *May*, 1804, were of age, and regularly, as I have endeavored to show, before the court. And this brings me to the last material inquiry involved in this cause.

*What effect will the defect in the proceedings against the infant respondents have upon those against the respondents, which are regular ? On this part of the subject I shall be very brief ; for I take it for granted, that very little need be said to show, that in every point of view, the order of the court below, setting aside the proceedings against the adult respondents, cannot be supported. In most cases, *all* the persons who may be affected by a decree of the Court of Chancery, must necessarily be made parties. There are cases also where, although they *may*, yet it is not absolutely necessary that they should, all be made parties.

Whether the children of *Mrs. Towers* are of the one or the other description, is not material, for, in either case, the result will be the same, and equally tend to show most demonstratively that this part of the order appealed from ought to be reversed. Let us suppose for a moment, they (the children of *Mrs. Towers*) were necessary parties before the order or decree of the 21st *May*, 1804, could be made, what ought the chancellor in this case to have done ? Most obviously, he should have told the other respondents they ought to have made that objection at the time when that order was about to be entered ; and although he might have permitted them to urge this defect

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on the petition for a rehearing, they ought not, by their own omission, to be placed in a better condition than they were in at the time when the order was entered. Suppose this objection had been urged at the time the order of the 21st of *May* was about to be entered, what would then have been the duty of the chancellor? Certainly not to set aside all the previous proceedings against the adult respondents. He would have suffered the cause to stand over for want of parties, and then the complainants (the now appellants) might have pursued the proper course to bring them into court; and this is the invariable practice of the Court of Chancery, even upon the final hearing of the cause.

On the other hand, if the children of Mrs. *Maitland* might have been made parties, though they were not necessary parties, it is certain that the omission to make them parties could, in no possible manner, vitiate the proceedings against the adults. That part of the order appealed from, therefore, ought to be reversed.

Much has been said in the course of the argument to prove, that in consequence of the delay which took place in making the assignment of the stock which fell to the share of the respondents, they have suffered a heavy loss, by reason of the depreciated value of it; and it has been insisted that the respondents are entitled to some relief from this court on that ground. This is a minor question in the cause, but which, notwithstanding, requires some consideration. The administration of this estate, in relation to the personal property, is yet before the chancellor. If, on the closing of this transaction, on the final liquidation of the accounts, this should be considered a valid claim on the part of the respondents, (and on this I give no opinion,) the chancellor, upon a proper application, is competent to enforce it. To do the respondents justice in this respect, it is surely not necessary to set aside the order of the 21st of *May*. The non-performance, on the part of the appellants, of that order, can never be a ground for vacating it.

I have, I am sensible, consumed much of the time of this court in giving my reasons for the opinion I have formed in this cause. But the importance of the decision about to be pronounced, and the very great responsibility which attaches to all who participate in that decision, render it necessary for me to detain the court a few moments longer.

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If the order of the 21st of *May* is set aside, as it respects the children of Mrs. *Towers* only, and is permitted to stand as to the other respondents, there can be no difficulty in the consequences which will flow from it. The election as to all the respondents being established, the rights of the parties can be easily ascertained, and will admit of but little room for future controversy, if the parties are disposed to peace. The question as to the value of *Rose-Hill* will be open to inquiry, as between the appellants and the children of Mrs. *Towers*, and the interest

of all the respondents in the property not elected by the appellants, will remain in the same state, as if the whole of the order of the 21st of *May* were established.

There are many other important considerations which might be urged against setting aside the order of the 21st of *May*, 1804, which I forbear to mention. Mrs. *Heyward* is no party to the petition for a rehearing, neither is she a party now before this court. This circumstance has not been without its influence in producing the opinion I have formed.

I am, therefore, of opinion, that such part of the order appealed from, as directs all the proceedings purporting to have been had against the children of Mrs. *Towers*, to be set aside, be affirmed, and that the remaining part of the said order relating to the proceedings against the other respondents, be reversed.

KENT, Ch. J., THOMPSON, J., and SPENCER, J., were absent.

CLINTON, Senator. This cause has derived importance, not only from the magnitude of the property which it involves, but from the long and animated discussions, the eloquent appeals, and the learned researches, which have been exhibited in this place. After an attentive hearing and mature deliberation, we are now called upon to pronounce our decision.

Nicholas Cruger, the former husband of the female appellant, and the father and grandfather of the respondents, *died possessed of a large estate in houses and lands, money and stock, of various descriptions. He left six children by his first marriage, and one by his second. Four of the children had arrived to full age, and three were infants, when the proceedings upon which this appeal is founded were commenced. By his will, dated several years before his death, he left one third part of his estate, both real and personal, to his wife and to her heirs and assigns for ever; and he directed that his wife might, if agreeable to her, take her third out of such part or parts of his estate, real and personal, or out of either of them, as she might choose, so that, on a fair and equitable valuation or appraisement of the same, the said part or parts, so chosen by her, should not together exceed one third of his said real and personal estate. The remaining two thirds were given to his children, to be divided among them, share and share alike, to be paid on their severally arriving at the age of twenty-one, and the income of the proportion of the minors was to be applied, during infancy, to their support and education, and to be paid to them, or for their use, either annually or otherwise, as occasion or their necessities might require. The wife and three friends of the testator were appointed his executors, with full power to sell and convey his real estate; and his executors were directed, as soon after his death as his wife should choose, "to assign and convey to her the one third part of his estate, real and personal, as

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before devised and bequeathed to her, in manner and form as is therein mentioned."

The friends of the deceased declined to act as executors, and the administration of the estate fell to the widow, who took upon herself the trust. The persons thus appointed to apportion the estate under the will, and with full power over the subject, having refused to serve in that capacity, serious difficulties arose, as to the allotment of the widow's share. Three of the heirs were infants, and one of the adults, Mrs. Towers, was in a foreign country. An arrangement among the devisees and legatees would not only be inconvenient, as it respected the absent one, but in relation to the minors, it would not be binding. Under these circumstances, the female appellant called to her assistance counsel learned in the law, who advised her to institute an amicable suit in chancery, for the purpose of appropriating to herself her share, and of silencing all future controversy. The suit was instituted. In its progress through the court, the parties became hostile. The proceedings became complicated, and were spun out to a great length, and hearing after hearing, order after order, and decree after decree, having taken place, we are now to decide upon an appeal from an order of the Court of Chancery, which has set aside all the proceedings in the cause against the infant children of *Elizabeth Towers*, one of the heirs, and all the proceedings against the other respondents, subsequent to the putting in their answers to the bill of revivor.

The cardinal point of controversy is the valuation of a part of the estate known by the name of *Rose-Hill*, and a lot in its vicinity. The improper motive, and the incorrect conduct charged against the appellants, and the irregular proceedings alleged to have taken place, are all exhibited with a view to operate upon that subject; and in order to present auxiliary inducements to the court, in case of too low an estimate of that property, to allow the respondents to come in and divide it, according to its real value, with the appellants. In order to decide properly on this controversy, it will therefore be necessary to inquire,

1. Whether the property at *Rose-Hill* and in its neighborhood, was really fixed at too low a price?

2. If it was, whether the respondents are concluded by any subsequent acquiescence, or any proceeding in the cause; this court taking into view the infancy of some of them, the conduct of the appellants to others, and any irregularities that may have occurred in the management of the suit.

In determining the value of *Rose-Hill*, it is of primary importance to fix upon the period of estimating it; and in order to do this with propriety, it is necessary to retrospect to the will. The trustees, if they had acted, would undoubtedly have been at liberty, at any time before the allotment to the widow, to have calculated the value of the estate. In

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deed, it would have been their incumbent duty, if a sudden and extraordinary rise had taken place in the value of any portion of the property, to have revised and corrected their valuation, at the very moment, when they were about executing the conveyance to the widow, under the will. Suppose, for instance, that they had compiled a schedule of the estate, had appraised the value of the parts, had estimated *Rose-Hill* at 50,000 dollars, and, on the 20th of *May*, 1804, had given directions to counsel to have the writings made out for their signature, on the next day, (the day on which the election and appraisement were confirmed by the chancellor,) and suppose that when, on the eve of executing the conveyance, it was satisfactorily established to them, that the land at *Rose-Hill* was greatly undervalued, and that it was worth 100,000 dollars; is there a man who hears me that would hesitate to say, that it was not the duty of the trustees to throw aside the writings, and to make a new appraisement? The proceedings in chancery were instituted with a view to remedy the evils that resulted from the declension of the trustees. The chancellor stood in their place. He was to make an equitable allotment under the will, and at any time before he made it, or, in other words, confirmed the appraisement and election, it was proper and obligatory on him to correct the valuation, and to see that it was fair and just. In deciding on the value of *Rose-Hill*, the proper era to select is the 21st of *May*, 1804. The time *in which the appraisement was made is not the time to govern us. The appraisers were not necessary, under the will. The chancellor himself ought to have made the valuation. The regular course of the court would, indeed, have been to have directed the master to report a schedule of the estate, and the value of the several parts. and then, after the election of the widow, to have referred the subject to the master, and on his report to have examined the whole case, and to have confirmed or annulled the election, as equity should prescribe. The appointment of appraisers was a substitute for the master; who would unquestionably have called in well informed men, and have taken their opinion, under oath, of the value of the property. But as the chancellor considered the appointment of commissioners as the most eligible mode of informing his conscience, I certainly do not object to the measure; but I contend that when the appraisement was exhibited to the chancellor, and he was called on to decide on its merits, that the 21st of *May*, 1804, the period he was so called upon, not the 7th of *March*, 1803, the date of the appraisement, was the proper time at which to calculate the value of the property.

It is not correct to say that the value must be considered as definitively established, at the time of the election; that previous to it, the widow was a tenant in common, with the heirs, but that the election severed the estate, and made her a tenant

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in severalty of the property elected. The admissions of the appellants themselves contradict this position. In the decree of confirmation of the 21st of May, 1804, entered by the consent of the parties, the sanction of the court to the validity of the election was deemed essential. If, previous to the confirmation, and after the election, any public calamity had occurred which would have diminished greatly the value of the property selected, it would have been competent for the appellants to come in and protest against the confirmation. *For instance; if an earthquake had swallowed up the place, or if an inundation of the ocean had swept it away, it would be hard and unjust to tie down the appellants to their selection. In like manner, any extraordinary rise in the value of the lands ought not to be confined to them; but the loss should fall on the estate generally, and the advantage be dispensed in the same way. Before confirmation the party is not bound. This principle is recognized in the case *Ex parte Miner*, (11 Ves. 559.) A person purchased an estate before a master, and presented a petition to have the report of the master confirmed; but before any order was made, a barn and stable, part of the premises, were destroyed by fire. The lord chancellor decided, that the loss should not fall on the vendee, but that it should be deducted from the purchase-money, upon the ground that no right or interest passed in the property, until confirmation. The election, in this case, was in the nature of a purchase or investment of a certain interest, springing out of the will in certain lands, and the appellants could obtain no permanent interest, until the court gave to their selection the stamp of its authority. A question, however, of very considerable importance presents itself, in relation to the nature of the confirmation of the 21st of May, 1804. The decree states, that the writing purporting to be the election by the appellants, of the several parcels, or articles, as the one third part of the estate devised to the female appellants by the testator, shall be deemed to be confirmed; but to remain in the hands of the master, subject to the further order of the court. And the whole complexion of the decree evidently shows that something ulterior was to be done, that the final settlement was postponed, and that the court reserved to itself the right of modifying, of changing, or of setting aside the arrangement, as long as matters in controversy, or for adjustment, remained before it.

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The *Rose-Hill* farm contains ninety-two acres, and has *a spacious house and suitable out-houses. It is less than one mile from the paved streets of the city of *New-York*, and about three miles from the *City Hall*. It is washed on one side by the waters of the *East River*, and is bounded on the other by the great post road, which, after proceeding a few miles, spreads itself in three directions; one to *Hell-Gate* ferry, which communicates with *Long Island*, and the remaining two routes to 450

Harlaem Bridge and *King's Bridge*, the only avenue to the continent. In point of situation and aptitude of conversion into town lots, for the accommodation of the citizens of *New-York*, it is unequalled. The extension of *Orchard street*, as has been for a long time contemplated, and has been commenced by the corporation, through the lands of *Stuyvesant* and others, and this farm, will enhance its value beyond all conception. A person, called upon in *May*, 1804, to estimate the value of *Rose-Hill*, ought to have calculated, not its value in gross or in mass, as it would bring under the hammer, without any favorable terms of credit, and not well husbanded or managed; but he would have taken into consideration its favorable position, its propinquity to the city, the sales of the neighboring lands, the intended extension of *Orchard street*, and the immense price which the place would bring, when converted into town lots. He would also consider, that the great augmentation of the value of property, on the island of *New-York*, did not arise so much from any extraordinary visitation of Providence, as from fixed and continually operating causes. An immense mass of population was confined within a narrow strip of land surrounded by the waters of the *Hudson* and *East Rivers*. This mass was invigorated by industry, enriched by commerce, animated by enterprise, and was progressing with a rapid and unceasing step. It was breaking with irresistible force through the limits in which it had been confined, and was extending itself, with astonishing celerity, into all parts of the country. *The rise of land in the vicinity of the city was then as certain as the extension of the city, and as its increase of inhabitants. This population was not only augmented by natural increase, but by crowds of strangers from *France*, from *Great Britain*, from *Ireland* and the *West Indies*, who took refuge, in our peaceful clime, from the ravages of war and the oppressions of despotism. The commercial and enterprising genius of *New-England* also perceived that *New-York* was destined by nature to command the commerce and to be the great store-house and emporium of two thirds of the *United States*, and to that place her sons resorted from all quarters, and prospered. That dreadful pestilence, which exhibits death in its most terrific forms, had visited the city in the summer and autumn of 1803, had compelled its inhabitants to retire from the scene of agony and horror, and had inculcated a general impression, that to obtain safety in future, it was necessary to retire in season into the country.

In order to illustrate the predominance and influence of that opinion, it is only necessary to say, that in 1805, when the yellow fever again appeared, the commercial and exposed parts of the city were immediately and generally evacuated, the citizens having purchased or procured, in season, places of retirement and safety; and that when it prevailed in 1798,

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owing to the neglect of this salutary precaution, the ravages of the disease were dreadful. The sales at *Kip's Bay*, which took place on the 16th of *May*, 1804, five days before the confirmatory decree in this cause, exhibit, in the strongest point of view, the operation of the causes I have just mentioned, on a favorable local situation, and after a visitation of yellow fever. *Kip's Bay*, where the lots sold are situated, is near half a mile farther in the country, and the land sold on an average at a sum exceeding 2,000 dollars an acre. *Rose Hill*, if divided into lots, would certainly have brought more. Exclusive of streets, it would produce *at least a thousand building lots, which, at the low rate of 250 dollars a lot, would amount to 250,000 dollars. The sales of *Bridgen's* property by the master, on the 5th of *August*, 1803, produced, on an average, 530 dollars per acre; but the situation is not so favorable; some of the parcels were large, and it is probable that the title was suspicious. But this is not a contemporaneous transaction. It took place nine months before the confirmatory decree. The testimony of *Titus* relates to *June* or *July*, 1802, when he states that he could have purchased at *Kip's Bay* for four hundred pounds an acre. The subsequent sales by *Hone* show the rapid rise of prices after that period. The fact of the appraisers valuing *Union Hall*, which is six miles out of town, and not one fourth as valuable per acre as *Rose-Hill*, at 625 dollars per acre, shows, demonstratively, the little reliance that can be reposed in the estimate. The circumstance that it was encumbered with the lives of *General* and *Mrs. Gates* is, no doubt, a great deduction from its value. The general was, at the time of the appraisement, seventy-five years old, and is since dead, and his lady was sixty-three. To allow seven years for the falling in of the two lives, and 2,000 dollars *per annum* for the estate, would be 14,000 dollars, which, added to the 50,000 dollars, would make 64,000 dollars, a sum totally inadequate, at the time, even when the appraisement was made. I reject the calculation of *Dr. K.*, as an absurdity on the face of it. He claims for the tenants for life upwards of 41,000 dollars. His calculation is founded upon an arbitrary hypothesis. He assigns no sufficient reasons; and, from a letter read in court, (which is not in the printed case,) it appears, when called upon by the appellant for an exposition of the grounds of his calculation, that he wraps himself up in mystery, exacts blind and implicit confidence, as the price of ten years' study and profound meditation. The mysteries of his calculations, like the *Eleusinian* rites, are to be concealed from *vulgar eyes, and it is sufficient for him to say, *Hoc volo, sic jubeo, sit pro ratione voluntas*. No man who knows any thing about the situation of *Rose-Hill*, but would be perfectly convinced that 25,000 dollars would be a great and exorbitant price to buy out the present incumbent. Upon a view of the whole case,

from a personal knowledge of the property, from a comparison with other and contemporaneous sales, and from a careful retrospect to the situation of real property, at that period, I have no question but that *Rose-Hill* was greatly undervalued by the appraisers, and that, between that period and the time of the confirmatory decree, it had greatly increased in value. When some of the respondents, afterwards, offered to pay 100,000 dollars, on a short credit for *Rose-Hill*, subject to the encumbrance of General and Mrs. *Gates's* lives, they did not offer its value. At that price they would have made a most lucrative bargain.

But allowing all possible force to the inadequacy of the price, it becomes now an important inquiry, how far a circumstance of that kind can have weight in this court. The respondents, it will be said, have all declared their consent to the election. The infants are bound by the acts of their guardians, the adults by their own stipulations, and the records of chancery rise up in judgment against them. It is well established, that in making a bargain, a mere inadequacy of price will not, alone and unsupported by other circumstances, be sufficient to set aside a contract. The case of *Heathcote v. Paignon* (2 Bro. Cas. 167.) speaks this language. This was an application to set aside an annuity, where there was 23 per cent. clear profit, with a certainty of the principal being secure, and where the terms were such, as to show evidently the distress of the party. The lord chancellor, in pronouncing his opinion in this case, said, "If mere inadequacy is the ground, it should seem that it was scarcely sufficient, but there is a difference between that and evidence arising from inadequacy: if there is such inadequacy, as to show that the person did not understand the bargain he made, or was so oppressed, that he was glad to make it, knowing its inadequacy, it will show a command over him, which may amount to fraud. If the transaction be such as makes overreaching on one side, and imbecility on the other, it puts the parties in such a situation as to show that it could not have taken place without superior powers on the one side over the other." And an able commentator, (*Powell on Contracts*, 156.) in remarking on this case, says, "that the circumstances which furnished evidence of the seller's having been distressed, and that his distress was taken advantage of in this case, seems to have been the buyer's having been acquainted with the seller's want of money, and his having enthralled him, (the seller,) by suffering him to contract a debt, by which means the buyer had him so far within his power, as that he might have distressed him, on his non-compliance with his own terms." The reporter of this case adds, in a note, that in a case in the Exchequer, in 1787, (*Griffith v. Spratley*.) the lord chief baron determined, "that there was no case where mere inadequacy of price, independent of other circumstances, had

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been sufficient to set aside a transaction." In the case of *Gwynne v. Heaton*, (1 Bro. Cas. 1.) Lord Thurlow observed, "that to set aside a conveyance on that ground solely, there must be an inequality, so strong, gross and manifest, that it must be impossible to state it to a man of common sense, without producing an exclamation at the inequality of it." Applying the spirit or principle of these cases to the cause before us, we are led to this conclusion, that the parties are concluded, or estopped, by their own agreement or consent, in the Court of Chancery, if no other objection can be brought forward than the low price of *Rose-Hill*. But it is to be observed, that slight circumstances, connected with great inequality, will induce a court to interfere and correct the evil. In the case of *Pope v. Roots*, (1 Bro. P. C. 370.) it was held that "inadequacy of price alone is not, when all parties are informed respecting that *about which they are contracting, a sufficient ground for a court of equity to refuse to give its sanction to a contract, unless the consideration be inadequate in a degree that will warrant the court to conclude fraud, from the internal evidence the transaction itself furnishes; yet it is a strong inducement to a court of equity, to seize upon any other ground that the case may furnish, which, coupled with that, may warrant it to interfere against the inadequacy." And in the case of *Morse v. Royal*, (12 Vesey, 373.) the lord chancellor declared, "If the court can discover that some advantage has been taken, some information acquired, which the other did not possess, though it is not to be precisely discovered, inadequacy, without going to the length of requiring it to be such as strikes the conscience, will go a vast way to constitute fraud."

If, therefore, any strong circumstances can be presented to this court, which can be connected with the low price of *Rose-Hill*, we can have no hesitation in decreeing in favor of the respondents.

And, 1. It is alleged, that the appellants, probably, obtained information of the appraisement of *Rose-Hill*, and regulated their selection accordingly, which gave them an unjust advantage over the respondents. Mrs. Rogers had, under the will, an unrestrained right of selecting one third of such of the property as she chose. In the exercise of this right, she ought not to invade those of others. The appraisers were not sworn to secrecy. They were only sworn to a faithful execution of their trust. The object of the appraisement was to enlighten the chancellor, not to inform the parties, and all that Mrs. Rogers could expect under the will, was the liberty of selecting her favorite objects, without any reference to, or knowledge of, the specification of the value. If, therefore, she was informed of the appraisement, and regulated her selection by the undervaluation of a particular article, not by a just exercise of

the right of choice; she had an undue *advantage, which ought not to be tolerated. The necessity of arresting an inference of this kind was so obvious to the appellants, that they have come forward with testimony. Their own oaths in this case would have silenced all suspicion; but the mode in which their testimony appears, creates an irresistible conclusion against them. *Low* and *Lawrence*, two of the appraisers, declare that they did not disclose to the appellants or to any other person or persons, except to themselves, as associate appraisers, the value affixed by them to the estate of the testator, or *any part thereof*. *Hammond*, the other appraiser, testifies that he never divulged the value affixed by them to the estate of the testator. This latter deposition only goes to an immaterial point. The disclosure of the *total value* was nothing. The substantial matter was a divulging of the value of the *parts*, which enabled *Mrs. Rogers* to compare them, or some of them, together; to select those that were valued low, and to reject those that were estimated high. This omission or silence is emphatically expressive. The affidavits of the appraisers were all written by the same hand, and taken on the same day, and before the same master. It is of no consequence where the affidavits were taken, whether in *West-Chester* or in *New-York*. A material fact is omitted, which enforces a belief that *Hammond* did disclose the appraisement of *Rose-Hill*, by which means it reached the appellants; and it will not answer to talk about honor or refined sentiment on this occasion, if the party deems it essential to establish a fact, and fails in the attempt. If the court consider it also important, the failure must recoil, with double force, against him. In justice to *Mr. Hammond*, it is proper to state that his affidavit is by no means incompatible with a disclosure of the value of *Rose-Hill*. In the mode in which the charge of knowing the value has been met and repelled, I must conclude that it is really well founded.

2. It is charged to the appellants, that they unjustly withheld the property of the respondents, which had *great influence in inducing them to close with the appraisement, whereby their interests were sacrificed.

The appellants, in relation to all the heirs of *Nicholas Cruger*, were in direct opposition. It was their interest to go beyond the third allowed i. e. the will, and the interest of the heirs to prevent it. This hostility of interests rendered the position of the appellants peculiarly delicate, because to it was superadded the character of trustees, which invested them with the possession and management of the whole estate, and which enabled them to withhold supplies from their opponents, and to exercise a control over their will. As trustees they were possessed of two thirds of the estate, and in their own right they held the other third. If, therefore, to augment their own shares, they made use of their power as trustees, they stand without any claim to the favor of the court of equity.

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Perhaps, it cannot be emphatically said that advantage was taken of the necessities of distressed men. Whether the wants of the heirs were real or factitious, whether they originated from a desire of exhibiting themselves in expensive life, or proceeded from an intention of supplying their families with necessaries, we shall not now undertake to ascertain. We know that they were desirous of obtaining possession of the property bequeathed to them, and that it was withheld, until they acquiesced in the election of *Mrs. Rogers*. We also know that they supposed it necessary for the support of their families; that *Mr. Bard* applied to the agent of the estate, and was refused; that *Mr. Henry Cruger, jun.* applied to *Mr. Rogers* in person, and was refused; that both the appellants gave the agent a general direction not to make any more advances; that *Mr. B. P. Cruger* applied in writing to *Mr. Rogers*, and was refused, until a final settlement should take place; that they did not receive any money for nineteen or twenty months, and were so pressed that two of them had to borrow money, and that, *upon their assent to the decree of the 21st of *May*, 1804, an arrangement was made for satisfying their wants; that *Mr. Bard*, for the first time, received money, in the following *June*, and that *Mr. H. Cruger, jun.* also participated; and that the ground which *Mrs. Rogers* took, in protesting against a partial settlement, was abandoned; that the very decree went upon the ground of a partial distribution; and that it actually took place, when his object was accomplished. He also knew that *Mrs. Rogers*, during her widowhood, had divided the cash in bank, without incurring risk or any responsibility; that *Mrs. Henry Cruger, jun.* was an infant, and that it was expressly enjoined on the trustees to support her in her minority; and any of his counsel could have told him, that he run no hazard in making advances to the children, within their proportions. Although I am far from saying that any systematic design of coercing the heirs was meditated by *Mr. Rogers*, and am disposed rather to attribute the interruption of supplies to that high state of feeling and irritation which unfortunately attends family quarrels; yet it is sufficient to know that this dispute, with whatever views it was managed, and from whatever cause it originated, had the effect of operating unduly upon some of the respondents, and of hastening or producing their compliance, without a full and fair view of the ground on which they stood.

3. It is obvious that great irregularities have taken place in the management of this cause; that the rights of infants have not been protected with that circumspection which the law requires, and that, particularly, one of the heirs, *Mrs. Towers*, and her orphan children, have been unduly and irregularly brought before the court.

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The original answer of *Mrs. Towers* was signed by a solicitor, without any authority. He was so conscious *that he had brought her surreptitiously into court, that he obtained the sig

nature of one of her attorneys, *John Nixon*, who had been, together with *David Walker*, appointed jointly to manage the ordinary business of the estate, and who had no authority to bind her by an answer in chancery. *Mrs. Towers* also had intermarried with *Mr. Maitland*, at the time of filing the bill, which was exhibited against her as a *feme sole*. The suit had also abated by the intermarriage of the appellants, before the heirs of *Mrs. Towers* had been brought in, and the order for the revival of it against her children was irregular, and could not apply to them. When the confirmatory decree of the 21st of *May*, 1804, was entered, *Sarah Cruger*, and the children of *Mrs. Towers*, were under age, and their interests were sacrificed, by consent of the other parties, without affording the court an opportunity of examining the merits, on the report of the master, to whom it was referred to report, or stating to the court, whose peculiar province it is to protect the rights of infants, the true situation of the case.

In 11 *Ves.* 563. it is decided, that a commission must go to take the answer of an infant out of the country, and that it cannot be put in on motion; and we are told (2 *Fonblancq*, 239.) "that guardians are appointed in chancery, where such appointment is necessary for the purpose of protecting the infant's general interest, or for the purpose of sustaining a suit, or for the purpose of consenting to the marriage of the infant, and that a guardian cannot be otherwise appointed, than by bringing the infant into court, or his praying a commission to have guardians assigned him." None of these prescriptions have been obeyed; the rights of the infants have been compromised, in every stage of the proceedings, by a species of legal *hocus-pocus*; and it is now peculiarly our duty to redress their injuries, and restore them to their *inheritance. In setting aside the proceedings against them, we must also embrace those against the adults; the interests of all the heirs are identified, as against the appellants.

Lastly, in our view of the whole case, although it is proper to consider and respect the intentions of the testator, yet we ought to bear in mind that *Mrs. Rogers* took under the will more than she was entitled to by the policy of our laws. If *Mr. Cruger* had died intestate, her interest in the reality would only have been for life, and certainly he never intended that she should go beyond her third, as given by the will. He left seven children; three unmarried young ladies under age, and a widowed daughter in a foreign land. Each of these children would be to the widow comparatively poor. Parental affection, the strongest feeling of the human heart, the sacrament of nature, implanted by the Deity in our bosoms, for the preservation and perpetuation of the species, is always awake and watchful over the destinies of our offspring; and it is not improbable that the last dying injunction of the testator was to

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guard with sacred care the inheritance and the fortunes of his children, and when on the bed of death, if his eyes were at any time diverted from another world, to the immense possessions that he was about to leave, the only consolation he could derive from the view, must have been the conviction, that his enterprise and industry had transmitted the blessings of affluence, and the advantages of fortune, to this wife and orphan children.

Without attending to the question, whether the right of transmitting our acquisitions to our children is a right derived from the laws of nature, or founded on the positive institutions of civil society; whether, as occupancy is the origin of exclusive property, the right in a state of nature does not cease with the possession, and *determine with the life of the possessor, and his acquisitions lapse into the common and undivided property of the human race, subject to the control, and liable to the enjoyment, of the first occupant; without attending to these inquiries, which are well calculated to command our attention, and arrest our curiosity, we cannot but be convinced that every sympathy of nature, every dictate of policy, and every injunction of religion, rise up, and declare in favor of the rights of inheritance. The man who would leave his children destitute, and bequeath his estate to strangers, must be a monster in the scale of moral estimation; and although our law will not annul a will on account of a violation of those ties which bind a parent to his child, yet it will, with avidity, embrace any circumstance that operates against his injustice, either by imputing derangement to his intellect, or supposing him the victim of fraud, and the dupe of imposture. An unequal or unfavorable distribution is liable, in degree, to the same objections, and the law will avail itself of every opportunity to support the rights of inheritance, and, in all cases of doubt, decide in favor of the children against claims that may be set up by the widow beyond her dower, and the third part of the personal estate. The intention of the testator is always to be understood, to be under the government of his duty; and unless he at once, and most palpably, throws aside the feelings of a parent, and renounces the obligations of a man, he is to be supposed to possess, to cultivate, and to obey them. The appropriation to the female appellant under the will, although her conduct was no doubt a course of exemplary affection and fidelity, was far too liberal, considering that the testator had seven children; that four of these were females, three under age, and the other a widow with four orphan children in a state of infancy. This disproportion ought most certainly not to be encouraged, and the wound permitted to run into gangrene, *by taking from the children, in the execution of the will, and adding to the gigantic portion of the appellants. Every consideration of justice revolts at this measure; and I feel a peculiar pleasure,

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that, in forming and pronouncing this decision, my feelings as a man are in perfect harmony and correspondence with the clearest dictates of my understanding, after an attentive, an impartial, and a laborious examination of the merits of this cause.

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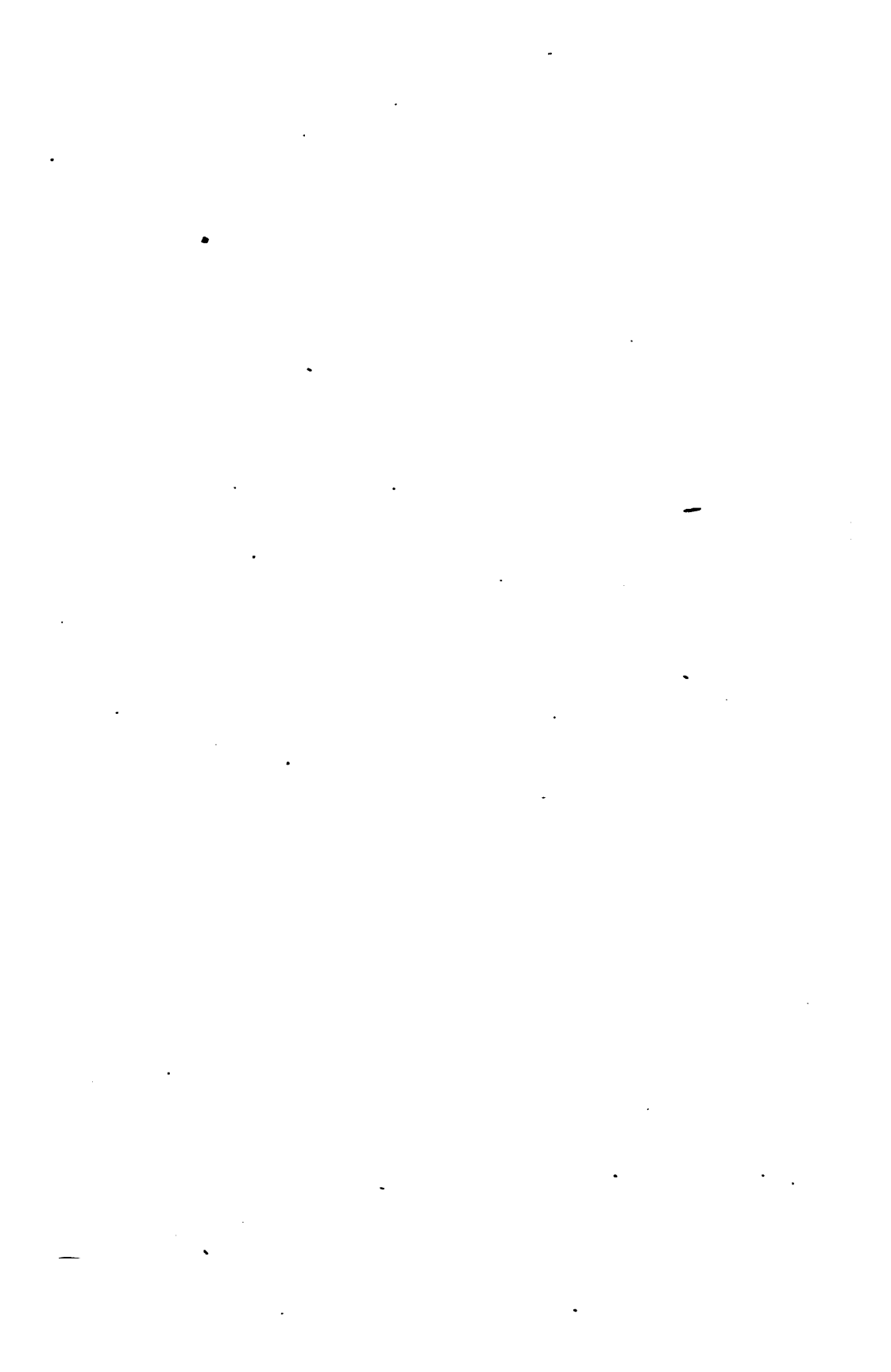
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The majority of the court concurred in this opinion; and it was thereupon ORDERED, ADJUDGED, and DECREED, that the petition of appeal exhibited by the appellants be dismissed, with costs, to be paid to the respondents by the appellants; and that the record and proceedings brought here by the said appeal be remitted to the Court of Chancery, to be proceeded on according to law.

Appeal dismissed.

END OF THE CASE IN ERROR.



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THE PRINCIPAL MATTERS

IN THE SEVENTH VOLUME

A.

ABSCONDING AND ABSENT DEBTORS.

- 1 A deposition taken before trustees appointed under the act for relief against absconding and absent debtors, may be read in evidence before referees nominated under the same act, after the death of the witness, though taken by the trustees in the absence of the creditors; the trustees being considered as agents of both parties. *Cox v. Trustees of Pearce*, 298
2. The court may inquire into the merits of the controversy, on the report of the referees, in such case, but will require strong grounds to induce them to set aside the report. *ib.*

ACCESSION.

See PROPERTY.

ACTS OF THE LEGISLATURE.

See STATUTES.

ACTION.

1. The same cause of action is where the same *evidence* will support both actions, though on different writs. *Rice v. King*, 20
2. A judgment for the defendant, in an action of trespass for goods, was held to be a bar to an action of *assumpsit*, before a justice of the peace, for the same cause. *ib.*
3. A *parol* promise to pay money as a gift, will not support an action, any more than a promise to deliver a chattel as a gift. *Pearson v. Pearson*, 26

ACTION FOR MONEY HAD AND RECEIVED, &c.

See PLEADINGS, 7. EVIDENCE, 5.

ACTION QUI TAM, &c.

In an action *qui tam*, on the 7th section of the "act to lay a duty, &c., and for regulating inns and taverns," (sess. 24. c. 164.) for retailing liquors without a license, the plaintiff, though he states and proves

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several distinct offences, can recover only one penalty. *Washburn v. M Inroy*, 134

AGENT.

1. An action may be maintained against an agent who has received money to which his principal has no right, if the agent has had notice not to pay the money over; and in some cases, without such notice, if the money has not been actually paid over. *Hearsey v. Pruyn*, 179
2. Where the owners of a ship authorized the master to sell the ship in the same manner as they themselves might or could sell her; and the master sold the ship, and at the time of sale represented her to be a registered ship, when, in fact, she sailed under a *coasting license* only; it was held that the master being a special agent for the purpose of the sale, the owners were not answerable for the false representation of the master, who exceeded his authority. *Gibson v. Colt and others*, 390
3. A power to sell does not, of itself, give the power to warrant the title of the thing sold. *ib.*

See CHANCERY, 1, 2.

ALBANY CORPORATION.

1. The Mayor's Court of *Albany*, in executing the power granted to them, under the act of the 4th April, 1801, (sess. 24. c. 153. s. 13. 21, 22.) as to taking the ground of any person to widen the streets, act *qua* commissioners, and not judicially, as a court. *Stafford v. Mayor, &c. of Albany*, 541
2. The power must be strictly pursued, and after the court have affirmed an assessment made under the act, they cannot set it aside for any cause, but are bound to pay the

money according to the assessment. *Stafford v. Mayor, &c. of Albany*, 541

3. No formal record is necessary in regard to the proceedings under the act, but it seems, they may be removed by *certiorari*, in order to be examined and corrected by this court. *ib.*

ALIENISM.

Where there is a failure of inheritable blood by reason of alienism, the lands do not escheat, but go to the next heir at law. *Jackson, ex dem. Elmendorf and others, v. Jackson*, 214

AMENDMENT.

In error from a court of common pleas, this court allowed the defendant in error to amend his declaration on paying the costs in the court below, subsequent to the declaration, by averring that the plaintiffs in error were partners, &c., and the plaintiffs in error were allowed 20 days after service of such declaration, to pay the amount recovered below, without costs, or to plead, and if they pleaded, a *venire de novo* was ordered, returnable at the next circuit. *Pease and another v. Morgan*, 468

ARREST.

See PRACTICE, 9.

ASSUMPSIT.

1. The debt of a person discharged under the insolvent act is due in conscience, and is a sufficient consideration for a new promise to pay the debt. *Scouton v. Eislord*, 36
2. But a promise by the insolvent to pay the debt when he is able with-

- out distressing his family, is a conditional promise, on which an action cannot be sustained, without showing that the defendant was able to pay without distressing his family. *Scouton v. Eislord*, 36
3. Where, in an action of *assumpsit*, the plaintiff, in his declaration, stated, that the defendant, "in consideration that the plaintiff before that time sold and conveyed a certain farm, &c. to the defendant, the defendant then and there undertook," &c., it was held that the count was not sufficient to sustain the action; the promise being founded on a *past* consideration; and it not being alleged that the farm was conveyed at the request of the defendant. *Comstock v. Smith*, 87
 4. Where a promise is founded on a past consideration, it must be laid to have been done at the request of the party promising, or, at least, it must appear that he was under a moral obligation to do the act, or procure it to be done. *ib.*
 5. On a motion in arrest of judgment, in an action of *assumpsit*, the promise laid in the declaration is presumed to be an express promise. *Beecker v. Beecker*, 99
 6. Where a landlord distrained the goods of his tenant, for rent in arrear, and A. signed an agreement on the back of his inventory, by which he "promised to deliver all the goods contained in the inventory to the landlord in six days after demand, or pay him 450 dollars, being the amount of the rent due, it was held, that this was an *original* not a *collateral* undertaking, and that an action might be maintained against A. for a breach of the promise. *Slingerland v. Morse and others*, 463
 7. *Assumpsit* lies against a deputy sheriff, upon an express promise to pay money, collected by him on execution, to the plaintiff. *Tuttle v. Love*, 470
 8. But the plaintiff must prove a clear and absolute promise. It is not sufficient that the deputy sheriff said "that he would pay the amount of the judgment, but not the costs for entering a rule for an attachment," when the plaintiff would not accept the one without the other. *Tuttle v. Love*, 470
 9. If one party does not accede to a promise as made, the other party is not bound by it. *ib.*

ATTORNEY.

Where an attorney of this court is sued, and a judgment is recovered against him for a sum exceeding 25 dollars, but less than 50 dollars, the plaintiff is entitled to full costs. *Walsh v. Sackrider*, 537

B.

BAIL.

1. Where the plaintiff takes an assignment of the bail-bond, and brings an action against the principal and the bail to the arrest, and obtains a judgment, and issues an execution, he cannot afterwards file common bail in the original suit, and proceed to judgment thereon; but is concluded by his election to proceed on the bail-bond. *Beecker v. Simmons*, 119
2. *Bail* may *depute* another to take and surrender their *principal*; and the bail or the person deputed by him, for that purpose, may take the principal in another state, or at any time, and in any place. *Nicolls v. Ingersoll*, 145
3. *Bail* may break open the *outer* door of the house, in order to take the *principal*. *ib.*
4. Where bail taken in a court of 463

common pleas remove out of the county, an action may be brought in this court on the recognizance. *Davis v. Gillet and another*, 318

BEEES.

1. Bees are *feræ naturæ*, and until hived and reclaimed, no property can be acquired in them. *Gillet v. Mason*, 16
2. Finding a tree on the land of another, containing a swarm of bees, and marking it with the initials of the finder's name, is not reclaiming the bees; nor does it vest in the finder any exclusive property in the bees; nor can he maintain trespass against a person for cutting down the tree and carrying away the bees. *ib.*

BIGAMY.

In prosecutions for *bigamy*, the mere confession of the party is not sufficient evidence of the first marriage; but there must be proof of a marriage in fact. *The People v. Humphrey*, 314

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a note payable on *demand* was negotiated two months and a half after its date, in a suit brought by the holder against the maker, the latter was allowed to show payment to the original payee before the transfer of the note to the plaintiff. *Losee v. Dunkin*, 70
2. There is no precise time at which such a note is to be deemed dishonored; but it must depend on the circumstances and situation of the parties. *ib.*
3. A note to pay sixty dollars in *neat cattle* is not a note within the

statute, and the consideration must be stated and shown. *Jerome v. Whitney*, 321

4. But the words *value received* in such a note, is *prima facie* evidence of consideration, and sufficient to cast on the defendant the burden of proving that there was no consideration. *ib.*
5. But if the plaintiff, in his declaration on such a note, instead of stating generally, that it was given for value received, sets forth specially in what the value received consisted, he is bound to prove the particular value, according to the averment; and the general acknowledgment of value in the note is not sufficient to support the declaration. *ib.*
6. Where a note was endorsed for the accommodation of the maker, and without consideration, it was held, that the endorser was liable for the amount, after due notice of non-payment, though the plaintiff knew at the time he took the note, that the endorser had received no consideration. *Brown v. Mott*, 361
7. But if there is any fraud in the case, and that known to the plaintiff, the endorser may show it in defence. *ib.*
8. And it seems, that if the plaintiff had purchased the note at a reduced price, he could not recover of such endorser more than he had paid for the note. *ib.*
9. A. sent a bill drawn on B. in *London*, enclosed to C., his agent in *New-York*, who sold and endorsed it to D., who remitted it to E. in *London*, to pay a debt due from D. to E. The drawee refused to accept the bill, which was regularly protested for non-payment, and the protest, with the *first* of the set was returned to D. on the 4th of *Oct.* 1808, who gave immediate notice to C. who paid to D. the amount of the bill on the 5th of *Oct.* with 20 per cent. damages. On the 20th of *August*, 1808, a few days after the protest, the drawee paid the

amount of the bill and all the charges, on the *second* of the set of exchange, to E. in *London*, which was not known in *New-York* when the *first* of the set was paid by C.; though notice was regularly sent by E. to D. and afterwards received. On the day on which C. paid to D. the amount of the bill and damages, D. remitted a sum to E. in *London*, to pay the debt for which the bill had been remitted, and for another sum which would shortly be due. In an action for money had and received, brought by A. against D., to recover back the amount paid to him on the *first* of the set of exchange; it was held, that the payment, after protest, to E., the endorsee and holder of the *second* of the set of exchange, was good and valid; that the dishonor of the bill was waived by the holder, before the payment to D. in *New-York*; and that A. was entitled to recover back the money, as paid under a mistake. *Durkin and Henderson v. Cranston and others*, 442

10. Where a promissory note, payable in *chattels*, was declared upon as under the statute, and the breach assigned was, that the defendant did not pay the money mentioned in the note, &c., it was held, after verdict, that the reference to the statute might be rejected, as surplusage, and the defect in assigning the breach was aided by the verdict, so that the court would intend that a sufficient breach was proved. *Thomas v. Roosa*, 461

11. In an action against two or more persons on a promissory note, with a joint name or firm, if the declaration contains no averment that the defendants were partners, or acted under the firm, but that the defendants "made the note with their own hands and names thereto subscribed," proof that one of the defendants subscribed the note with the joint name or firm is not

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sufficient to prove the contract as laid. *Pease and others v. Morgan*, 568

See INSURANCE, 16.

BLOCKADE.

See INSURANCE, 2, 3, 4, 5.

BOND.

Where, by the condition of a bond, the obligor had an election to pay 600 dollars for a patent right at the end of 12 months, or to account to the obligee for the profits, &c., the obligor sold the right to a third person, and made no election within 12 months; it was held, that the obligor having failed to make his election, or to perform any part of the condition of the bond within the time specified, he had lost his election, and the obligee might elect which he would demand, and hold the obligor for the payment of the 600 dollars. *M Nitt v. Clark*, 465

C.

CAYUGA COUNTY SUPERVISORS.

The act of the 4th of *April*, 1807, (sess. 30. c. 122.) directing the supervisors of the county of *Cayuga* to raise a sum of money for building a fire-proof clerk's office, is mandatory; and the supervisors are bound to execute it without delay; and the supervisors, who, at their annual meeting in *Nov.* 1809, refused to raise money for that purpose, will be held liable to an action for the penalty given by the act of the 20th of *March*, 1807, (sess. 30. c. 43.) for neglecting and refusing to levy

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and raise money by tax. *Caswell*,
qui tam, &c., v. *Allen*, 63

CHAMPERTY AND MAINTENANCE.

Where a person purchases land, knowing at the time that the land is held adversely to the person of whom he purchases, by persons claiming by deed, he is liable under the "act to prevent and punish champerty and maintenance," (sess. 24. c. 87.) to an action for the value of the land, and the improvements thereon. *Teale, qui tam*, &c., v. *Fonda*, 251

CHANCERY.

1. Where T., a *feme sole*, residing in *St. Croix*, in *October*, 1800, gave a power of attorney to A. & Co., to act for her, in regard to her share of the estate of C., of *New-York*, deceased, of whom she was one of the heirs, and, afterwards, in *April*, 1801, the answer of T. to a bill in chancery, filed relative to the estate of C., was signed by A., with the name of A. & Co., as attorneys of T., but without any knowledge of the marriage and subsequent death of T., or revocation of the power; it was held, that the answer was not properly signed, or put in, and that the subsequent proceedings were, therefore, irregular. *Rogers and Wife v. Cruger and others*, in error, 557
2. It seems, that a general power to act, relative to the management of an estate, does not authorize an attorney to put in an answer, for the principal, to a bill in chancery, relative to it; and that answers to bills in chancery must be signed by the party, and put in under oath. *ib.*
3. An infant cannot bind himself, by his own assent, nor even by the consent of a guardian, unless his

acts are deemed by a court of chancery beneficial to him. *Rogers and Wife v. Cruger and others*, in error, 557

4. Where C., by his last will and testament, devised one third of all his estate to his wife, to be taken out of such parts of the estate, real or personal, as she might elect, so that, on a fair and equitable valuation and appraisement of the same, the parts she should choose should not exceed the value of one third of his estate, &c. Under an order of the Court of Chancery, the whole of the estate of C., real and personal, was valued and appraised by three persons, appointed by the court, and sworn as appraisers, and the widow made her election of parts of the real and personal estate, amounting to one third of the appraised value; at the instance of the heirs, the appraisement was, afterwards, set aside, on the ground of a gross mistake of the appraisers in calculating the value of a certain part of the estate, connected with other circumstances in the case, though no actual misconduct or fraud was to be imputed to the appraisers. *ib.*

CHEAT.

1. To constitute a *cheat* or fraud an indictable offence, at common law, it must be such a fraud as would affect the *public*; such a deception as common prudence cannot guard against; as by using false weights or measures, or false tokens, or where there is a *conspiracy* to cheat. *People v. Babcock*, 201
2. Where A. had a judgment against B., and B. came to A., and said he would settle by paying money in part, and giving a note for the residue, and A. drew a receipt in full, in discharge of the judgment, and B. got possession of the receipt without paying the money, or giving a note; and the indictment charged

him with having obtained the receipt falsely, fraudulently and deceitfully, and under false acts and colors, and under pretence that he had the money in his pocket, and would pay it immediately, and give his note for the residue, it was held that there was no *false token*, but only a false assertion, and that an indictment would not lie. *People v. Babcock*, 201

CONSIDERATION.

1. Where there is a consideration expressed in a deed, without saying, "and also for other considerations," proof of any other consideration than the one expressed is not admissible. *Maigley v. Hauer*, 341
2. If the consideration in a deed is not truly stated, the party must seek his relief in a court of chancery. *ib.*

See ASSUMPSIT, 1, 3, 4. BILLS OF EXCHANGE, &c., 3, 4, 5.

CORPORATION.

A corporation may sue, though it cannot be sued, before a justice's court. *Hotchkiss v. Religious Society in Homer*, 356

COSTS.

1. Where judgment is given in the court below for the plaintiff, and that judgment, on a writ of error, is reversed above, the plaintiff in error recovers no costs. *Pease and another v. Morgan*, 468
2. Where an attorney of this court is sued, and a judgment is recovered against him for a sum exceeding 25 dollars, but less than 50 dollars, the plaintiff is entitled to full costs. *Walsh v. Sackrider*, 537

3. In an action of covenant for the non-payment of rent reserved in a lease, if the plaintiff recovers judgment for less than 250 dollars, he is entitled only to the costs of the Court of Common Pleas. *Beecker v. Platt*, 555

COURT-MARTIAL.

1. A *summons* to appear before a regimental court-martial, to show cause why a fine should not be levied, under the act to organize the militia of the state, (sess. 24. c. 166. s. 30.) is in the nature of *process*, and must be *personally served*. *Capron v. Austin*, 95
2. An action lies against the president of a regimental court-martial, for issuing a warrant by which a fine was collected, when the party had not been personally served with a summons to appear and show cause, but only a copy thereof left at his house. *ib.*

Sed vide Act, sess. 32. c. 165. s. 76. *aliter*.

COURT OF COMMON PLEAS.

Error lies from a judgment of *nonsuit* by a court of common pleas, as it is a judgment with costs. *Schemmerhorn v. Jenkins*. 373

COVENANT.

1. Where A., in consideration of 500 dollars, paid in full for 50 acres of land, covenanted to convey the land to B., by a good and sufficient deed, on or before a certain day, or in lieu thereof to pay him 800 dollars; it was held, that B. was entitled to recover, for a breach of the covenant, the 800 dollars with interest

- it being in the nature of liquidated damages, and not a penalty. *Slosson v. Beadle*, 72
2. In an action of covenant, brought by the grantee against the grantor, for a breach of the covenant against encumbrances in a deed, the *postea*, in an action of ejectment brought against the grantee by a mortgagee on a prior mortgage of the same land, is sufficient to support the action. *Waldo v. Long*, 173
 3. The plaintiff in this action is entitled to recover not only the *consideration* money in his deed, and the *interest*, but also the *costs* of the ejectment suit against him. *ib.*
 4. Where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, the defendant cannot set it up as a condition precedent; but the covenants in such case are regarded as independent. *Bennet v. The Executors of Pirley*, 249
 5. In an action of covenant, the plaintiff declared, that in consideration of 400 dollars, paid to the defendant, he promised to convey, on the 1st of *December*, 1802, to the plaintiff, a certain lot of land lying in N., the same to be appraised by A. and B., and if appraised at more than 400 dollars, the plaintiff was to pay to the defendant the surplus, and if at less than that sum, so much was to be deducted, &c., and averred that he was ready to receive a deed, but the defendant did not convey, &c. On demurrer, the declaration was held good. *ib.*
 6. In an action on a covenant contained in a deed, by which the grantor "*gave, granted*," and engaged to *warrant* and defend the land against all claims, &c., it was held that no action could be maintained either on the implied or express covenant, without alleging and proving eviction; and that the express warranty qualified and restrained any implied covenant of seisin arising from the word *give*. *Kent v. Welsh*, 258
 7. In an action of covenant on the covenant against encumbrances in a deed, the plaintiff, if he has paid off the encumbrance, may recover the amount paid by him; but if he has not paid any thing, he can recover nominal damages only. *De Lavergne v. Norris*, 358
 8. If he does not choose to wait until he is evicted by the mortgagee, he may satisfy the mortgage, and resort to his covenant. *ib.*
 9. In an action of covenant on the covenants of *seisin, power to sell, quiet enjoyment, against encumbrances*, and *warranty*, contained in a deed, it was held that the breaches in the declaration were well assigned in the words of the covenants; that an entry of the covenantor himself, tortiously, and without title, is a breach of the covenant for quiet enjoyment; and that a breach of the covenant of *warranty* is bad, if it does not state an *eviction*. *Sedgwick v. Hollenback*, 376
 10. Where the plaintiff alleged that the defendant was not seised, &c., and the defendant pleaded that he was seised, &c., and the plaintiff replied that he was not seised, because one W. B., at the time, was seised of three undivided seventh parts of the premises, this was held a good assignment of a breach of the covenant, for it shows that the defendant was not seised absolutely in fee of the whole right. *ib.*
 11. But the stating an outstanding mortgage and judgment, at the time of the covenant, without averring a foreclosure, or possession under the mortgage, is not alleging a sufficient breach of seisin; a judgment of itself does not transfer the title, or destroy the seisin. *ib.*
 12. Where A. covenanted to pay B. 300 dollars, on a certain day, on which B. covenanted to convey a

farm to A., and before the day, B. agreed to receive the 300 dollars in bank bills, which A. tendered at the day; but B. refused to receive them, it was held, in an action of covenant against B., that the agreement to receive *bank bills* was a waiver of a tender in gold and silver, and was complete evidence, at the trial, to support the tender at the day. *Warren v. Main*, 476

See LEASE, 4. EXECUTORS AND ADMINISTRATORS, 5.

D.

DEED.

1. If, in the description of an estate in a deed, there are particulars sufficiently ascertained to designate the thing intended to be granted, the addition of circumstances, false or mistaken, will not frustrate the deed. *Jackson, ex dem. Rogers and another, v. Clark*, 217
2. But where the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree with every particular of the description. *ib.*
3. Where the description of the premises in a deed were, "all, &c. lot No. 1, of the smaller lot No. 3, of the subdivision of lot No. 10, in the 12th general allotment of the patent of K." &c., and there was a mistake in inserting the 12th, instead of the 21st general allotment, it was held, that the premises which were claimed to be in the 21st general allotment passed by the deed. *ib.*
4. And if the words, "with the dwelling-house thereon," be inserted in

the description, when, in fact, there was no dwelling-house on the premises claimed under the deed, it is merely a *false circumstance*, which does not control the rest of the description, nor defeat the grant. *Jackson, ex dem. Rogers and another, v. Clark*, 217

5. By a map of the survey of a certain tract of land for which patents were issued, lots No. 15 and 16 were made to join each other, and by the mistake or fraud of the surveyor, according to the courses and distances of his survey, the line of lot No. 15 would not extend to lot No. 16, but left a vacant piece of land between them; it was held, after various mesne conveyances, during a lapse of near 18 years, that the parties should be bound by their *actual location*, under the deed, according to the metes and bounds given in the original survey, without reference to the map and patents. *Jackson, ex dem. Goodrich and others, v. Ogden*, 238
6. What acts and declarations of parties will amount to such a practical location and construction by them, as to be binding and conclusive, though made under a mistake as to the extent of their legal rights. *ib.*

See CONSIDERATION, 1; 2.

DEVISE.

- A. made his will, duly executed, and devised all the lands of which he was then possessed to his four sons; and having afterwards become seised of other lands, he altered his will by erasures and interlineations, so as to make the devise extend to all lands of which he should *die seised*; and endorsed a *memorandum*, to that effect, on the will, stating the alterations he had made; but the *memorandum* was attested by two witnesses only; it was held.

that the erasures and interlineations did not destroy the original devise, but that the alteration, not having been attested by *three* witnesses, could not operate; and the lands acquired subsequent to the date of the devise descended to the heirs at law. *Jackson, ex dem. Howard and others, v. Holloway*, 394

DEVISEE.

See LEGACY

DOWER.

1. The privilege of the widow "to tarry in the chief house of her husband 40 days, or until her dower be assigned to her," (*Laws*, sess. 10. c. 4.) will not protect her against an action of ejectment brought after the 40 days have elapsed, by the heir, or any person deriving title from the husband. *Jackson, ex dem. Clark, v. O'Donaghy*, 247
2. If the widow's dower is not assigned to her during her *quarantine*, she may bring her action, and recover damages from the day of her husband's death, but she cannot enter for her dower, until it is assigned to her; and after the 40 days, the heir may expel her, and put her to her suit. *ib.*
3. The estate of the mortgagor is the real estate at law, and the *widow* of the mortgagor may recover her *dower* out of the land mortgaged; and the tenant deriving title by *mesne* conveyance from the husband of the demandant cannot deny the seisin of the husband; nor set up the mortgage as a subsisting title; there having been no foreclosure or entry by the mortgagee. *Collins v. Torrey*, 278

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E.

EJECTMENT.

See PRACTICE, 3. 10.

ELECTION.

Where, by the condition of a bond, the obligor had an *election* to pay 600 dollars for a patent right, at the end of 12 months, or to account to the obligee for the profits, &c., and the obligor sold the right to a third person, and made no election within 12 months; it was held, that the obligor having failed to make his election to perform any part of the condition of the bond within the time specified, he had lost his election, and the obligee might elect which he might demand; and hold the obligor for the payment of the 600 dollars. *M'Nitt v. Clark*, 465

ENTRY ON LAND.

- A. died seised of land, in 1771, leaving a widow, an only son, his heir at law, and a daughter. The widow entered into possession of the land, and the daughter having married B., the widow gave permission to B. and his wife to occupy a part of the land; and B. continued in possession, claiming to hold it, in right of his wife. In an action of ejectment brought by the heir at law against B., it was held, that the legal intendment was that the widow entered as guardian *in socage* to her infant; and that the defendant, having entered by permission of the guardian, and under the title of the heir at law, could not set up a title in a third person, in contradiction to the title

under which he so entered. *Jackson, ex dem. Davy, v. De Waltz*, 157

ESCHEAT.

1. Where there is a failure of inheritable blood, by reason of *alienism*, the lands do not *escheat*, but go to the next of kin. *Jackson, ex dem. Elmendorf and others, v. Jackson and others*, 214
2. L., a native of *New-York*, was seised of lands in 1749. He afterwards went to *St. Thomas*, a *Danish* island, there married a *Danish* subject, by whom he had two daughters, and died in 1750. One of the daughters died without issue, and before coming of age; the other married a *Danish* subject, and died in 1774, leaving an *infant* daughter, who died in 1775. It was held that the two daughters were *British* subjects within the statute of 3 *Geo. II. c. 21.* but that the granddaughter was an *alien*; and that the lands of L. did not *escheat* by reason of her *alienism*; but the issue of the elder brother would inherit, as the next heir at law. *ib.*

ESCAPE.

See SHERIFF.

EVIDENCE.

1. Where an agreement for the sale and conveyance of land, dated in 1689, was produced in evidence, the jury were allowed, in 1809, to presume a conveyance pursuant to the agreement. *Jackson, ex dem. Stoutenberg and others, v. Murray*, 5
2. The contents of a *certiorari*, or other writ, cannot be proved by parol, but the original, or a sworn copy of it, must be produced. *Brush v. Toggart*, 19
3. In an action of *assumpsit* on a promise to deliver a quantity of boards, at a certain time and place, in which the defendant pleaded that he had the boards at the time and place ready, &c., it was held that proof of there being boards of a sufficient quality and quantity, at the time and place, was not sufficient to support the plea, without also proving that they belonged to the defendant. *Cobb v. Williams*, 24
4. Testimony as to the declarations of a person deceased, unless made on oath, or *in extremis*, when he came to a violent end, is not admissible. *Gray v. Goodrich*, 95
5. It is not necessary, in all cases, to give positive evidence that the defendant has received money for the plaintiff, but where, from the facts proved, it may fairly be presumed that the defendant has received the plaintiff's money, the plaintiff may recover for money had and received to his use. *Tuttle v. Mayo*, 132
6. In an action against a sheriff for the escape of a prisoner charged in execution, it is sufficient evidence, *prima facie*, on the part of the plaintiff, to entitle him to recover, that the prisoner was seen at large walking in the street. *Steward v. Kip*, 165
7. In an action brought by a sheriff on a bond taken for his security, on granting the liberties of the gaol to a prisoner on execution, against the sureties, the record of a judgment of recovery against the sheriff for an escape of the prisoner, is conclusive evidence for the plaintiff. *Kip v. Brigham and others*, 168
8. And a *verdict*, without the judgment, is evidence, at least, to prove the recovery and actual damages, if not the escape. *ib.*
9. In an action of covenant, brought

- by the grantee against the grantor, for a breach of the covenant against encumbrances, in a deed, the *pos- tea* in an action of ejectment brought against the grantee by a mortgagee, on a prior mortgage of the same land by the grantor, is sufficient evidence to support the action; and the plaintiff is entitled to recover not only the consideration-money in his deed, and the *interest*, but also the *costs* of the ejectment suit against him. *Waldo v. Long*, 173
10. If a plaintiff read in evidence an act of the legislature from a newspaper, which is admitted by the court, and the defendant afterwards reads an exemplified copy of the same act, he cannot, afterwards, on *certiorari*, allege for error, the admission of the act read by the plaintiff, although not legal evidence. *Hearsey v. Prayn*, 179
11. *Parol* evidence of a disclaimer of title to real property is not admissible. *Jackson, ex dem. Van Alen and others, v. Vosburgh*, 186
12. Where an acknowledgment of tenancy, on the part of the defendant in ejectment, has been proved, he will not be allowed to give evidence to contradict or disprove the title of his landlord. *ib.*
13. Whether there be a tenancy or not, is matter of fact; and *parol* evidence may be received to disprove it. *ib.*
4. Any matter arising since issue joined, and which might have been pleaded *purs darrein continuance*, must be so pleaded, and cannot be given in evidence under the general issue. *Jackson, ex dem. Colden and others, v. Rich*, 194
15. A deposition taken before trustees appointed under the act giving relief against absent and absconding debtors, may be read in evidence before referees nominated under the same act, after the death of the witness, though taken by the trustees in the absence of the creditors, or *ex parte*, the trustees being considered as agents of both parties. *Cox v. Trustees of Pearce*, 299
16. In prosecutions for *bigamy*, the mere confession of the party is not sufficient evidence of the first marriage: but there must be proof of a marriage in fact. *The People v. Humphrey*, 314
17. In an action against two or more persons, on a promissory note, with a joint name or firm, if the declaration contains no averment that the defendants were partners, or acted under the firm, but that the defendants "made the note, with their own proper hands and names thereunto subscribed," proof that one of the defendants subscribed the note with the joint name or firm is not sufficient to prove the contract as laid. *Pease and another v. Morgan*. 468

EXECUTORS AND ADMINISTRATORS.

1. Where a person makes a fraudulent conveyance of goods to another, for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate; and an action may be maintained against the administrators for the goods. *Osborne v. Moss*, 161
2. A. confessed a judgment in favor of B. fraudulently, for the purpose of defeating his creditors, on which an execution issued, and the goods of A. were seized, when A. died intestate, and the goods were purchased at the sheriff's sale by B., as the highest bidder, for the same fraudulent purpose; and C., being a creditor of A., took out administration on his estate, and seized and took the goods out of the possession of B. as the property of A. In an action of trespass brought by B. against C., it was held that C.

in his character of administrator, could not impeach the judgment on the ground of fraud; and that he had no right to take the goods as a creditor, without suit, but was a trespasser. *Osborne v. Moss*, 161

3. But though C. was administrator of A., he might, as a creditor, have sued B. as executor *de son tort*. *ib.*
4. A., having made his will, died in *New-York*, leaving B. and C. his surviving children and residuary legatees. B. took out administration with the will annexed, and died, leaving goods, &c. of A. unadministered, and particularly a large debt due from D. to the estate of A. in *England*. It was covenanted and agreed between E., administrator of B., and C., who resided in *England*, that E. should release to C. all right to the goods of A. in *England*, and empower C. to take out administration in *England* on the goods, &c. of A., and to indemnify C. from all legacies, actions, &c. in consequence of taking out such administration in *England*; and C. covenanted to account to A. for all moneys she should receive of D., and E. covenanted that in case E. should not obtain administration in *England*, or in case, after obtaining such administration, D. should refuse to account to E. for all moneys due from him to the estate of A., and pay the same within one month after notice, and request to him from C., that E., as administrator of B., would pay and satisfy to C. all her full share of the real and personal estate of A., her father, &c. C. obtained administration in *England* of the goods, &c. of A., and demanded payment of the debt due from D., who, being before and at that time, insolvent, and unable to pay, offered to pay C. the amount of the principal of the debt due to the estate of A., exclusive of the interest which had accrued, if C. would acquit and

discharge him from all further demands, but otherwise he would not pay; and C., as most advantageous to the estate of A., accepted the offer, and received the principal of the debt from D. without the interest, and thereupon released and discharged him. In an action of covenant, brought by C. against E. on the agreement, to recover her share of the estate of A., it was held, that the release by B. of the debt due from D. to the estate of A. was a good defence; that C., by the agreement, was to take out administration in *England*, solely for the purpose of collecting the debts due from D., and had no discretion to compound for the same, or release any part of it, and by so compounding, and releasing D., C. had taken the debt upon herself, and had failed to perform the condition precedent to her right of action against E., the administrator of B., under the agreement. *De Diemar and Wife v. Van Wagenen*, 404

F.

FOREIGN LAWS.

See INSOLVENT DEBTORS, 2, 3.

FRAUDS, STATUTE OF

1. A contract for the sale and delivery of the *possession* of land, and the *improvements* thereon, must be in *writing*; otherwise, it is within the statute of frauds. *Howard v. Easton*, 205
2. Possession is *prima facie* evidence of title, and is an *interest in land* within the statute. *ib.*
3. Where a landlord, having distrained the goods of his tenant, for rent in

arrears, A. signed an agreement endorsed on the inventory of the goods, by which he promised to deliver all the goods to the landlord in six days after demand, or pay him 450 dollars; it was held, that this was an *original*, not a *collateral* undertaking, and that an action might be maintained against A. for a breach of the promise. *Slingerland v. Morse and others*, 463

See JUSTICES' COURT, 1. 6.

FRAUDULENT CONVEYANCES.

- 1 Where a person makes a fraudulent conveyance of his goods to another, for the purpose of defeating his creditors, and dies intestate, the conveyance, though void as against creditors, is good against the intestate, and an action may be maintained against the administrator for the goods. *Osborne v. Moss*, 161
- 2 A. confessed judgment to B. *fraudulently*, for the purpose of defeating his creditors, on which execution issued, and the goods of A. were seized, when A. died intestate, and the goods were purchased by B., at the sheriff's sale, as the highest bidder, but for the same fraudulent purpose; and C., being a creditor of A., took out administration on his estate, and seized and took the goods out of the possession of B., as being the property of A. In an action of trespass brought by B. against C., it was held, that C., in his character of administrator, could not impeach the judgment, on the ground of fraud; and that he had no right to take the goods, as creditor, without suit, but was a *trespasser*. *ib.*
- 3 But though C. was administrator of A., he might, as a creditor, have sued B., as *executor de son tort*. *ib.*

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G.

GAOL LIBERTIES.

1. In an action brought by a sheriff, on a bond taken for his security, on granting the liberties of the gaol to a prisoner on execution, against the sureties, the record of a judgment of recovery against the sheriff for an *escape* of the prisoner, is conclusive evidence for the plaintiff. *Kip v. Brigham and others*, 168
2. And where a *verdict* was recovered against the sheriff, for the escape of a prisoner, who had given security for the liberties of the gaol, it was held, that the *postea* was evidence without the judgment, (in an action by the sheriff on the bond,) to prove the recovery and actual damage, at least, if not the escape. *ib.*
3. The sheriff is entitled to recover against the sureties on the bond, for the gaol liberties, not only the amount of the debt and costs in the original suit, but also the costs of defending the suit against him for the escape. *ib.*
4. A person who has given security for the liberties of the gaol is bound, at his peril, and at the risk of his sureties, to keep within the liberties; and though the limits established by the Court of Common Pleas are in any part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined, and within the limits; for he is bound to know and observe the limits. It is not the duty of the sheriff to ascertain the liberties; but he is required to let the prisoner on execution go at large within the liberties when established by the Court of Common Pleas. *ib.*
5. Where the bounds of the liberties of the gaol were marked by no visible monuments, and the survey

of them, as appointed by the Court of Common Pleas, was, in some parts, vague and uncertain, and a prisoner, who had given a bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the *reputed* limits, but which proved not to be within the acknowledged *actual* liberties, and returned within the actual liberties before suit brought, it was held, that this being an inadvertent and involuntary escape, and a return before suit brought, the sheriff was not liable for an escape. *Ballou v. Kip*, 175

6. Do not the *reputed* liberties, in such a case, afford the best evidence of the actual liberties of the gaol ? *ib.*

See SHERIFF.

GIFT.

1. A *gift* is not consummate until the delivery of the thing promised; and until the delivery, the party may revoke his promise. *Pearson v. Pearson*, 26
2. A *parol* promise to pay money, as a *gift*, will not support an action. *ib.*

GOVERNOR OF THE STATE.

By several acts of the legislature from 1804 to 1807, the governor of the state was authorized to draw from the treasury a sum not exceeding 750 dollars, in each year, to defray the *incidental expenses*, in administering the government of the state; and the governor, having received the sums there appropriated, exhibited his account of his expenditures, equal to the amount received; it was held, that the propriety of the *items* charged for these incidental expenses was not a subject of judicial cognizance; but was necessarily left to the discretion of the executive, under the control of the

legislature, and that the governor was not liable to an action, at the suit of the people, to recover back any part of the money so received and expended, on the ground of its having been improperly expended
The People v. Lewis, 73

GREGORY'S PLANTATION.

The boundary of the tract of land on *New-York Island*, called *Gregory's Plantation*, is not to be construed to extend *west* of the old *Harlaem* road. *Jackson, ex dem. Stoutenburgh, v. Murray*, 5

GUARDIAN IN SOCAGE.

- A. died seised of land in 1771, leaving an only son, his heir at law, and a daughter. The widow entered into possession of the land; and the daughter having married B., the widow gave permission to B. and his wife to take possession and occupy a part of the land, and B. continued in possession, claiming to hold in right of his wife. In an action of ejectment, brought by the heir at law against B., it was held, that the legal intendment was, that the widow entered as guardian *in socage* to her infant son; and that the defendant, having entered by permission of the guardian, and under the title of the heir at law, could not set up a title in a third person, in contradiction to the title under which he so entered. *Jackson, ex dem. Davy, v. De Warts*, 157

H.

HIGHWAYS.

- A road used as a public highway for 20 years next preceding the 21st *March* 475

1807, becomes a public highway, though not recorded; and it does not cease to be a public highway, though originally leading to a dock and landing, or ferry, and such ferry has been changed, and though some part of the way has been appropriated and built upon, if the passage continues open to the same dock and landing. *Galatian v. Gardner*, 106

HUSBAND AND WIFE.

1. A., being seised of land, in right of his wife, executed a lease in 1796, to B. for life, which was assigned to C. In 1806, A. and his wife executed a lease to D. for the same lands, for the same lives, and with the same covenants. A. died in 1808, and the wife, afterwards, in 1809, received rent of C.; it was held that the wife, having joined her husband in executing the lease in 1806, which was duly acknowledged according to the statute, had put it out of her power to affirm the lease given by her husband in 1796, and that D. could not be prejudiced by her acts. *Jackson, ex dem. Campbell and Read, v. Holloway*, 81
2. It seems, that where the wife is not a party to a lease of her land, it is void, as to her; and an acceptance of rent, or any act of the wife, after the death of her husband, will not confirm it. *ib.*

I.

INDIANS.

1. Where a patent for a lot of land was granted, in 1791, to an *Oncida* Indian, as a bounty for his services as a soldier, during the revolution- 476

ary war, "to hold unto him and his heirs and assigns for ever," and the patentee died, leaving two sons, his heirs, who sold and conveyed the land to A., it was held that the sale and conveyance were void. *Jackson, ex dem. Gilbert, v. Wood*, 290

2. *Indians* residing in the state of *New-York* cannot, according to the constitution and laws of the state, alien their lands, without the consent of the legislature, or the approbation of the surveyor-general. *ib.*

INDICTMENT.

See CHEAT.

INFANCY.

1. The infancy of the plaintiff is not a ground of nonsuit at the trial, but must be pleaded in abatement. *Schemerkorn v. Jenkins*, 373
2. Such an appearance is good after verdict, by the statute of *jeofails*. *ib.*
3. By pleading in chief, the defendant admits the due appearance of the plaintiff. *ib.*

See CHANCERY, 3.

INTEREST.

See COVENANT, 4.

INSOLVENT DEBTORS.

1. The debt of a person discharged under the insolvent act is due in conscience, and is a sufficient consideration for a new promise to pay the debt. *Scouton v. Eislord*, 36

2. If an insolvent who has obtained his discharge under the insolvent act, undertakes to plead specially, and to state all the proceedings in relation to his discharge, he must state a conformity to the act, in every respect; and if he does not state the facts correctly, and especially, if he does not state that *three fourths* of his creditors in amount subscribed his petition, &c., so as to give the judge jurisdiction, the plea is bad. *Frary v. Dakin*, 75

3. A person in prison on execution, who has obtained his discharge under the "act for the relief of debtors with respect to the imprisonment of their persons," (sess. 24. c. 66.) passed the 24th *March*, 1801, may, by virtue of the 7th section of the "act to amend the act for giving relief in cases of insolvency," passed the 8th *April*, 1808, (sess. 31. c. 163.) be proceeded against by action of *debt*, though he was discharged in 1802, previous to passing the last act, which provides that he shall not be held to bail, or his body taken in execution, on any judgment obtained in such action: and such action is no infringement of the immunity vested in him, by virtue of his discharge under the first act. *Spencer v. Rickardson*, 116

4. A discharge under the insolvent act of the state of *Connecticut*, by which the *person* of the debtor is protected from arrest and imprisonment, for any debt due to any creditor named in the insolvent debtor's petition, is no bar to a suit by any such creditor against such debtor, in this state. *White v. Carpenter*, 117

5. Such discharge is limited to the person only, without discharging the debt, and is *local* in its effect. *ib.*

6. The costs of suit mentioned in the 21st section of the act giving relief in cases of insolvency, (sess. 24. c.

131.) do not mean costs arising on suits before instituted by the insolvent. Such costs are not entitled to a preference over other debts. *Dey v. Lovett and others*, 374

See ASSUMPSIT, 2.

INSURANCE.

1. A vessel and cargo were insured from *New-York* to *St. Lucar*. The policies contained the following clause: "The insurers take no risk of a blockaded port; but if turned away, the assured to be at liberty to proceed to a port not blockaded." The vessel sailed from *New-York* the 23d *December*, 1807. On the 27th *January*, 1808, she was captured off *Cape St. Mary's*, on the coast of *Portugal* about 70 or 80 miles from the shore, by a *British* cruiser, and sent to *Gibraltar*, and was there condemned in the Vice-Admiralty Court, as lawful prize, "for having violated the blockades of *Cadiz* and *St. Lucar*." During the months of *January* and *February*, there was a blockading squadron off *Cadiz*, which might be seen from *St. Lucar*, and a vessel coming out of that port counted a fleet of 29 sail; and it was generally understood that the blockade included *St. Lucar* as well as *Cadiz*; it was held, that the clause in the policy extended to every loss happening by reason of a blockaded port, whether such blockade was strictly legal or not, and that the insurers were not liable. *Radcliff v. United Insurance Company*, 38
2. Notice, either actual or constructive, of the existence of a blockade, is requisite, before a neutral can be deemed *in delicto*, or to have violated his neutral duty, by attempting to enter the port. *ib.*
3. What constitutes a lawful block-

ade? *Radcliff v. United Insurance Company*, 38

4. There was a blockade, in fact, of *Cadiz* and *St. Lucar*, in *January*, *February* and *March*, 1808. *ib.*
5. It seems, that the accidental and temporary dispersion of a blockading squadron, by a storm, is not a suspension of the blockade, provided the fleet uses all due diligence to resume its station. *ib.*
6. A vessel was insured from *New-York* until she safely arrived at *Nantz*, in *France*. The policy contained the following clause: "Warranted not to abandon, in case of capture or detention, until six months after advice thereof, or until condemnation; also free from seizure or detention in port; and not to abandon, in consequence of being turned away, or for having been carried into any *British* port," &c. The ship sailed from *New-York* the 24th of *December*, 1808, and during the voyage was visited by two *British* cruisers, who endorsed her register, forbidding her to enter any port of *France*, &c. Having met with a gale of wind, and being near *Belle-Isle*, she went there for a pilot, and was chased by a *British* cruiser under the lee of the island, and having taken a pilot on board, she lay to, about an hour, about a league from the shore, and distant about 30 miles from *Nantz*, the fog being so thick that the ship could not safely proceed; and while in this situation, about a league and a half from the principal fort, and nearly in reach of cannon shot, the ship was taken possession of by a *French* armed boat, and carried in under the guns of the fort, and there claimed as prize; and was afterwards condemned under the *Milan* decree of the 17th *December*, 1808, for having been visited by a *British* cruiser. It was held that this was not a seizure or detention in port, with-

in the meaning of the clause in the policy, and that the insured were entitled to recover for a total loss, and also for the expenses of the captain in endeavoring to obtain the release and restoration of the ship, which included the wages of the captain from the time he left the ship until he arrived in *New-York*, and his passage money, with commissions and interest. *Watson v. The Marine Insurance Company*, 57

7. But the insurer on the ship is not liable for any expense specifically and exclusively for the benefit of the cargo, nor for any sum *per diem*, agreed on by the owner to be allowed the captain while in port. *ib.*
8. The insurer may recover above the sum insured, for the expense of labor and travel for the defence and recovery of the property insured. *ib.*
9. And where expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer on the ship, though the freight and cargo should be incidentally benefited, and ought to contribute in proportion; leaving the insurer on the ship to recover, if he can, of the owners or insurers of the freight and cargo, for their contributory shares. *ib.*
10. Where the preliminary proofs of interest and loss on a policy of insurance were submitted by the insurers to their agent, who stated the amount of loss, which was accordingly paid into court; it was held that the act of the agent of the insurers admitted the sufficiency of the proofs, in the first instance. Payment of money into court admits the cause of action as stated in the plaintiff's declaration. *Johnston v. Columbian Insurance Company*, 315
11. A quantity of hides was purchased at *Montevideo*, for *American*

merchants, and shipped on board of an *American* vessel for *New-York*, and an export duty on the hides was paid to the officers of the *Spanish* government, and the vessel was ready for sea, but was prevented sailing by a *British* squadron, which afterwards captured the place, and was not permitted to sail, until she had paid an export duty on the cargo, to the officers of the *British* government. On the arrival of the vessel at *New-York*, the hides were sold to *American* merchants in *New-York*, who shipped them, in another *American* vessel, to *Amsterdam*, accompanied with a certificate of origin, from the *French* consul in *New-York*, declaring that "they were purchased at, and exported from, *Montevideo*, prior to the capture of that place by the *British*;" which certificate was a usual and customary document on board *American* vessels bound to *France* or *Holland*, and rendered necessary by the decrees of *France* and *Holland*. The vessel was captured by the *British*, and condemned as enemy's property, or otherwise subject to forfeiture, on the ground of a continuity of voyage from an enemy's colony, to the mother country of an enemy of *Great Britain*. The hides were purchased on the 24th of *June*, at ten cents per pound, and transhipped about the 7th of *July*, and were invoiced at twelve cents per pound, being the value thereof at the time. In an action on an open policy of insurance on the hides, it was held, that the certificate of origin being a customary document for such a voyage, and substantially true, and put on board, *bona fide*, by the insured, there was no breach of the warranty of *American* property, and that the insured were entitled to recover for a total loss. *Le Roy and others v. The United Insurance Company*, 343

12. The insured was not bound to disclose to the insurer that such a paper was on board; it being a paper in the usual course of trade; and it is always open to inquiry how far a paper, though intentionally false, was material to the risk. *Le Roy and others v. The United Insurance Company*, 343
13. The amount of the loss in this case was held to be the prime cost of the hides, or ten cents per pound, and the charges thereon. *ib.*
14. It seems, that in estimating a total loss on an open policy of insurance, the value of the goods at the outset, or commencement of the risk, with the usual charges, is what the insurer ought to pay, and that the prime cost is generally the safest and best rule of ascertaining such value; especially where the goods are purchased for exportation. *ib.*
15. A vessel was insured from *New-York* to *Bordeaux*. The policy contained the following clause: "Warranted *American* property, also warranted not to abandon, if detained or captured, until after a detention of six months, unless previously condemned; nor if refused admittance or turned away, but may proceed to another near open port." The vessel, within twenty leagues of the *Isle of Oleron*, or the mouth of the *Garonne*, met a *British* squadron of five sail, and was boarded by one of the squadron, and informed that all the ports from *Russia* to the *Dardanelles* were blockaded by *British* ships, and the master was warned, that if he attempted to enter any port under the influence of *France*, his vessel and cargo would be liable to capture and condemnation by the *British*; and he was told that he must either go to *England* or *Malta*, or return to *America*. Not having sufficient water to return to *America*, the master, after consulting his officers and crew, shaped his course for *Eng*
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- *land*, with an intention to reach *Falmouth, Plymouth or Guernsey*; but the ship springing a leak, and meeting with violent and adverse winds, he was compelled, by necessity, for the preservation of the ship, &c., to go into *L'Orient*, where the vessel and cargo were seized by the *French* government. It was held, that notwithstanding the existence of the *Berlin* decree, the ports of *France* were not to be considered as shut, as it regarded the ship insured; that the terms "*near open port*" must be understood in a geographical sense; that neither of the *English* ports was to be considered as a *near port* to *Bordeaux*; and that the attempt of the master to reach a port in *England* was a *deviation*, which put an end to the policy. *Tenet v. The Phoenix Insurance Company*, 363
16. In an action brought by *insurers* against the *endorser* of a promissory note, given to secure the payment of the *premium* on a policy of insurance, the *insurers*, before the commencement of the suit, having become liable to pay the insured, who was the maker of the note, a *return of premium* on the same policy; it was held, that the defendant was entitled to have the amount of such return of premium deducted from the amount of the note, notwithstanding the maker was, at the same time, indebted to the *insurers* for other notes, given for premiums on other policies of insurance, and had become insolvent. *Phoenix Insurance Company v. Fiquet*, 383
17. If any of the terms used in a policy of insurance have, by the known usage of trade, or by use and practice, as between *assurers* and *assured*, acquired an appropriate sense, they are to be construed according to that sense. *Coit and Pierpoint v. Commercial Insurance Company*, 385
18. *Parol* evidence is admissible to show that, by the general usage, among merchants and underwriters in *New-York*, the word *roots*, first inserted in the *New-York* policies in 1787, is confined to such *roots* as are *perishable in their own nature*; and that *sarsaparilla* is not a *root* perishable in its nature, or included under that term, in the memorandum in the policy. *Coit and Pierpoint v. Commercial Insurance Company*, 385
19. A vessel was insured from *New-York* to *Bordeaux*, and at and from *Bordeaux* to *New-York*. The vessel, on her return voyage, was captured on the 24th of *January*, 1808, and carried into *England*, and on the 1st of *June*, 1808, the insured abandoned. The correspondents of the insured, at the request of the master, put in a claim for the assured, as owners of the vessel and cargo; and the vessel, on the 20th of *March*, 1809, was condemned, and the cargo restored. They entered an appeal from the sentence as to the vessel, and the captors appealed from the sentence as to the cargo. By a compromise, both appeals were withdrawn, and the master, on the 3d of *June*, 1808, purchased the vessel of the captors, for 1,300*l.* with all her original papers, and sailed for *New-York*, where he arrived in safety, and delivered the cargo. To raise money to pay for the vessel, and to defray the expenses arising from the capture, the master gave a *bottomry* bond to the correspondents of the insured in *London*. It was held that the insured were entitled to abandon for a total loss, and their rights having become fixed by the act of abandonment, on the 1st of *June*, 1808, they were not bound by the subsequent acts of the master, but were entitled to recover for a total loss, and also for all the expenses incurred in endeavoring to recover the property, prior to the

at the request of the defendant, and security taken for his appearance at the time; such security must be by recognizance, taken by the justice, or a writing signed by the bail, otherwise, the undertaking is within the statute of frauds, and the bail cannot be made liable.

M Nutt v. Johnson, 18

2. The contents of a *certiorari* cannot be proved by parol, but the original or a sworn copy of it must be produced. *Brewer v. Taggart*, 19
3. In an action of *assumpsit*, before a justice of the peace, for *staves* sold and delivered, the defendant pleaded a former action of *trespass*, brought by the same plaintiff for the same staves, against the defendant, in which there was a verdict and judgment for the defendant. It was held that the judgment in the action of trespass for the same goods was a bar to an action of *assumpsit* for the same cause. *Rice v. King*, 20
4. In an action before a justice of the peace, a plea of a former action and trial, between the same parties, in which the present plaintiff set off his demand, is not good, if the money on which the demand was founded was not then due; and the set-off, for that reason, rejected. *Bull v. Hopkins*, 22
5. A. sued B. in an action of *trespass*, and also in *assumpsit*, and the process in both suits was returnable, at the same time and place, and the action of trespass was first called on, and issue joined, and the cause adjourned to a future day; and immediately after, the action of *assumpsit* was called on, and the defendant pleaded matter by way of set-off, which was rejected by the justice, on the ground that it ought to have been pleaded in the first suit; but it was afterwards allowed to be set off at the trial of the action of trespass. It was held, that the set-off ought to have been allowed in the action of *as-*

sumpsit, and the judgment below was reversed. *Allen v. Horton*, 23

6. In an action before a justice, on a promise of the defendant to pay the plaintiff a sum of money owing to the plaintiff by the son of the defendant, the only evidence was that the defendant had said that he would pay to the plaintiff the money which his son owed the plaintiff. No objection being made to the evidence, the plaintiff recovered. It was held that the promise was void, for want of a consideration, and for not being in writing; and that the defendant had not, by not objecting to the sufficiency of the proof, waived the benefit of the statute of frauds. *Pease v. Alexander*, 25
7. The law as to trials by jury, in other courts, applies to a justice's court. *Blackley v. Sheldon*, 32
8. In an action before a justice, the defendant is not entitled to a nonsuit, because the *venire* is not returned at the time appointed for the trial; but another *venire* may be issued; and if the defendant does not demand another *venire*, but goes to trial before the justice, it is a waiver of the trial by jury. *Blanchard v. Richley*, 198
9. Where the defendant pleaded a former trial before the same justice, for the same cause of action, and the justice stated, from his knowledge, that the plaintiff was nonsuited at such former trial, and said that it was no bar, and the defendant did not deny the statement, but went to trial, he was held to be concluded by the fact. *ib.*
10. Where a cause before a justice was tried by a jury, and after the jury had retired to deliberate on their verdict, they sent to the justice, requesting that a witness, who had been previously sworn in the cause, might be sent to them, or that they might come into the court, in order to ask the witness some questions; and the justice asked the parties

if they would go to the jury, that the witness might be examined, but the defendant refused, and the justice permitted the witness to go to the jury room, and stood at the door while he was examined, and then retired with the witness, and the jury, afterwards, came into court, and found a verdict for the plaintiff; this was held not to be a sufficient irregularity to set aside the verdict and judgment. *Henlow v. Leonard*, 200

11. A corporation may sue, though it cannot be sued, before a justice's court. *Hotchkiss v. The Religious Society in Homer*, 356

12. A justice cannot adjourn the trial of a cause, at the instance of the plaintiff, for more than six days; but where a justice, at the request of the plaintiff, adjourned a cause for 10 days, and the defendant appeared and examined a witness, it was held to be a waiver of the irregularity. *Denham v. Heyden*, 381

13. Where a person is brought before a justice on a warrant, and prays for an adjournment, and bail is taken for his appearance at the day, there must be a personal appearance of the party, and not by attorney, otherwise, the bail will be liable for the amount recovered by the plaintiff. *ib.*

14. The right of a justice to adjourn a cause, of his own motion, must be claimed and exercised, at the return of the process; if the first adjournment is made by consent of parties, the justice cannot, of his own motion, adjourn the cause a second time. *Kilmore v. Sudam*, 520

15. But the plaintiff having consented to the second adjournment, and the defendant making no objection, it was held to have been made by consent of both parties. *ib.*

16. Where a justice, having signed a return to a *certiorari*, made a supplementary return, and then made another return stating that the sup-

plementary return was incorrect, the court refused to receive the supplementary return, and expressed strong disapprobation of the practice of preparing returns for *certiorari* for justices, without their request, especially by the party, or his attorney, who sued out the *certiorari*. *Rudd v. Baker*, 548

L.

LANDLORD AND TENANT.

Where a tenant *wilfully* holds over, after the expiration of the term, and a notice to quit, the landlord is entitled to double rent. *Hall v. Balentine*, 536

See LEASE.

LAWS.

It is a principle of universal jurisprudence, that laws, civil or criminal, must be *prospective*, and cannot have a *retroactive* effect. *Dash v. Van Kleeck*, 477

See STATUTES.

LEASE.

1. A., being seised of land, in right of his wife, executed a lease to B. for life, in 1796, which was assigned to C. In 1806, A. and his wife executed a lease to D., for the same land and for the same lives, with the same covenants. A. died in 1806, and the wife, after his death, received rent of C. It was held, that the wife, having joined with her husband in 1806, in executing

- composition between the master and captors, which expenses were to be apportioned, as general average, and borne by the vessel, freight and cargo; but the insured on the vessel could only recover the proportion chargeable to the vessel. *Junel and Desobry v. Marine Insurance Company*, 412
20. The rule that the insured may recover, in the first instance, of the insurers on the vessel, the whole general average, does not apply to the case where the ship, freight and cargo belong to the same person, and the freight and cargo are not insured. *ib.*
21. The insurers having refused to accept the ship, and affirm the purchase made by the master, they were held not to be answerable for the *marine* interest, secured to be paid by the *bottomry* bond, nor for any charges or loss consequent to the purchase; but only for a total loss, and expenses of laboring for the recovery of the vessel, &c., prior to the composition with the captors. *ib.*
22. The *wages* of the crew, during a detention by an embargo, are not chargeable to the *ship*, nor are they *general average*, but fall exclusively on the *freight*. *M' Bride v. Marine Insurance Company*, 431
23. If a ship is abandoned to the insurer, and he accepts the abandonment, *it seems*, he is entitled to the subsequent freight; and the subsequent wages of the crew will be chargeable to him as owner, but not as insurer. *ib.*
24. If the insurer does not accept the abandonment, he can be liable only for a total loss, and the necessary expenses incurred, in laboring for the safety and recovery of the subject insured; in which may be included the expenses of *wharfage*, and of *selling* the ship. *ib.*
25. A cargo was insured from *New-York* to *Cherbourg*, in *France*; and the policy contained a clause, "War-
- ranted free from seizure for or on account of any illicit or prohibited trade." The vessel met an *English* cruiser, and was compelled to go into the outer road of *Plymouth*, where she was detained 6 hours, and then suffered to proceed, but no person belonging to the vessel went on shore during the time of her detention. The vessel and cargo arrived at *Cherbourg*, and were there seized, under the *Berlin* decree, and confiscated, on the alleged ground that the captain on his examination by one of the officers of the port had made a *false* declaration, that he had not been in *England*. It was held, that this was not a loss arising from any illicit or prohibited trade; but under the general perils of "arrests and detainerments of princes;" and that the insurers were liable. *Mumford v. The Phoenix Insurance Company*, 449
26. A sentence of a court of *admiralty* is sufficient evidence of a condemnation, without showing the previous proceedings; and a copy of the sentence under *seal* of the court, signed by the *actuary*, in the absence of the *register*, accompanied with a deposition of a witness proving the *seal* and signature, was held sufficient authentication. *Gardere v. The Columbian Insurance Company*, 514
27. Whether the *seal* of a court of *admiralty* is not, of itself, evidence? *quære. ib.*
28. Where the policy of insurance contained a clause of warranty as neutral property; and also a clause "that in case of loss or misfortune, it should be lawful and necessary for the assured, his factors, servants, and assigns, to sue for, labor and travel in and about the defence, safeguard and recovery of the property," &c. it was held, that in case of a capture, the assured, or their agents, were not bound to put in a claim or appeal; and though the property was condemned because

no claim was interposed, yet the assured were entitled to recover; for the assured had a right to abandon immediately, on advice of the capture; and after an abandonment rightfully made, the master becomes the agent or servant of the insurers, and is answerable to them for his misconduct or neglect. *Gardere v. The Columbian Insurance Company*, 514

29. A. sold a vessel to B., in whose name she was registered; but it was agreed between them, that A. should have the whole benefit of the *freight* to arise from a voyage, for which A. had previously chartered the vessel, and on which she was about to sail. B. insured the vessel as owner for the voyage, and A. procured insurance to be made on the *freight* of goods on board of the same vessel for the same voyage; but the agreement between A. and B., or the peculiar nature of A.'s interest, was not communicated to the insurer. It was held, that A. had not any *insurable* interest, or such an interest as could be insured under the name of *freight*, without disclosing and specifying its peculiar nature. *Riley v. Delafield*, 522

30. Insurance on a cargo from *New-York* to *Charleston*, on goods specified in the margin of the policy, to the amount of 1,310 dollars. The policy contained the following written clause: "The assurers by this policy take no other risk than general average, and such total loss only as may arise by the absolute destruction of the property." The vessel was stranded the day after she sailed, and part of the goods were unladen, and stored at *Barnegat*, and the residue put on board a lighter, which was detained from sailing by the ice; and before the goods stored on shore were sold, and while the lighter was detained, a part of the goods were stolen or lost. Part of the cargo insured consisted

of *beef, butter, candles, soap, apples* and *potatoes*, and the rest of iron and hardware. The invoice cost of the articles insured was 1,194 dollars, and the amount of the articles stolen or lost was 332 dollars. It was held that the policy was upon so much of the cargo, as an integral subject, and that the assured could not recover for each article totally lost, there being neither a general average nor a total destruction of the subject insured. *Guerlain v. The Columbian Insurance Company*, 527

J.

JUDGMENT BOND.

See *SHERIFF*, 16.

JURY

1. After a jury have retired to consider of their verdict, they may return into court, and hear evidence as to any matter about which they have doubts. *Blackley v. Sheldon*, 32
2. The court may send a jury back to reconsider their verdict before it is recorded, if there is any mistake. *ib.*
3. After a verdict is pronounced in court, the jury may alter it, before it is received or recorded. *ib.*
4. After a verdict is received, the jurors may be *polled*, and either of them may disagree to the verdict. *ib.*

See *VERDICT*.

JUSTICE'S COURT.

1. In an action before a justice of the peace, where the cause is adjourned,

LOAN OFFICERS.

See SURETY.

LOCATION OF PATENTS OR DEEDS.

See PATENTS, 1, 2, 3, 4, 5. DEEDS, 2, 3, 4, 5, 6.

LOTTERY TICKETS, INSURANCE OF.

See WAGER, 2.

M.

MANDAMUS.

An *alternative mandamus* was directed to a town clerk, commanding him to record the survey of a road, pursuant to the act, (24 sess. c. 186.) or show cause, &c., and the clerk returned that he did not record the survey, because one of the commissioners had signed the survey by the name of *Zaccheus Higby*, whereas he was elected by the name of *Zaccheus Higby, junior*; and because the commissioners had not taken the oath of office, and filed a certificate of the oath with the clerk, according to the act. It was held that the return was insufficient, and a *peremptory mandamus* was awarded. *The People, ex relat. Bush and Higby, v. Collins, 549*

MASTER OF A SHIP.

See AGENT, 2.

MILITIA.

See COURT-MARTIAL.

MOHAWK TURNPIKE AND BRIDGE COMPANY.

1. According to the true construction of the act relative to the *Mohawk* turnpike bridge company, passed 29th March, 1809, (32 sess. c. 189.) the corporation cannot legally exact more than *half toll*, or 6 1-4 cents for crossing the bridge at *Schenectady*, with a wagon and horses, &c., from the inhabitants of the city of *Schenectady*, or from persons going to and from mills, &c. *Hearsy v. Pruyn, 179*
2. The discretion given to the corporation to mitigate the rate of the tolls in such cases, is to be exercised only in reducing them below one half. *ib*
3. The words in the act, "going to and from mills," comprehend *saw* mills as well as *grist* mills. *ib.*
4. An action lies against the *toll-gatherer*, who has received the excess of *toll*, if he has notice not to pay it over, or if he has not actually paid it over, if he had sufficient notice of the plaintiff's claim. *ib.*
5. *It seems*, that the right of the corporation to take toll may be tried in an action against the toll collector, where notice has been given to him not to pay it over. *ib.*
6. The privilege granted by the second section of the act (32 sess. c. 189.) incorporating the *Mohawk* turnpike and bridge company, to the inhabitants of *Schenectady*, going to market with the produce of their farms, and returning from market, of paying only *half toll* is *personal*, and is waived, if the person carries to, or brings back from, market, the goods of others; and though he carries the produce of his own farm to market; yet if, on his return, his wagon is loaded in part with his own goods, and in part with the goods of others, he must pay full *toll* for the return load. *Hearsey v. Boyd, 183*

MORTGAGE.

1. The notice of sale of mortgaged premises, pursuant to a power under the statute, may be postponed to a further day, provided notice of the postponement be also inserted in the gazette, and put up on the court-house door; and it *seems*, that it is not necessary to give a further notice of *six months* of such postponement. *Jackson, ex dem. Rogers and another, v. Clark and another*, 217.
- 2 But where notice of a sale was given in *February*, to take place on the 12th of *August* following, which was duly published, &c., and in *June* a notice was inserted in the gazette, that the sale was postponed to the 3d *September*, but notice of the postponement was not put up at the court-house door, and the sale took place on the 12th *August*, pursuant to the original notice; it was held that the sale was irregular and void. *ib.*
- 3 The estate of the mortgagor is the real estate at law, and the widow of the mortgagor may recover her *dower* out of the lands mortgaged; and the tenant, deriving title by mesne conveyance from the husband of the demandant, cannot deny the seisin of the husband, nor set up the mortgage, as a subsisting title, there having been no foreclosure or entry by the mortgagee. *Collins v. Torry*, 278.
4. A purchase of the mortgage from the mortgagee is, in effect, a discharge of this mortgage, in favor of the title under the mortgagor. *ib.*

N.

NEW TRIAL.

Where the counsel for the defendant, after he had summed up the evidence in the cause, and while the

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plaintiff's counsel were addressing the jury, discovered new and material evidence which he offered to produce, but the judge, supposing he had no discretion, refused to admit it, unless the plaintiff's counsel would consent, which, being refused, a verdict was found for the plaintiff; it was held, that the judge had a discretion to admit the evidence, and that as it ought to have been received, the defendant was entitled to a new trial. *Mercer v. Sayre and Toler*, 306

NONSUIT.

Error lies on a judgment of *nonsuit* by a court of common pleas, as it is a judgment with costs. *Schemerhorn v. Jenkins*, 373

NOTICE TO QUIT.

A tenant at will, after an act of voluntary waste, by which he has determined his estate, is not entitled to a notice to quit. *Phillips v. Covert*, 1

O.

OFFICE AND OFFICER.

1. The acts of an officer *de facto*, who comes into office by color of title, are valid, as it concerns the public, or third persons who have an interest in his acts. *The People, ex relat. Bush and Higby, v. Collins*, 549
2. A mere *ministerial* officer has no right to decide on the acts of such officer *de facto*, or adjudge them to be null. *ib.*

ONONDAGA COMMISSIONERS.

1. An award of the *Onondaga* com-

- a lease, which was duly acknowledged, according to the statute, had put it out of her power to affirm the lease given by her husband in 1796, and that D. could not be prejudiced by her acts. *Jackson, ex dem. Campbell and another, v. Hollaway*, 81
2. *It seems*, that where the wife is not a party to a lease of her land, it is void as to her, and an acceptance of rent, or any act of the wife, after the death of the husband, will not confirm it. *ib.*
 3. The assignment of a lease in writing, though not under seal, is good. *Holliday v. Marshall*, 211
 4. Where, in a lease for a term of years, it was covenanted between the lessor and the lessee, that at the expiration of the term, the building and improvements should be valued by three or five indifferent persons to be chosen by the parties, and the amount paid by the lessor; and after the term and surrender of the premises, the lessee applied to the lessor to agree on three or five persons to appraise the buildings, &c., and he refused; on which the lessee had the buildings, &c. appraised by three indifferent men, who valued them at 750 dollars; it was held, in an action against the lessor on his covenant, that the lessee was not entitled to receive interest on the 750 dollars, found by the jury, as the *ex parte* appraisal was not conclusive, and the damages remained unliquidated, to be ascertained by the verdict of a jury. *ib.*
 5. Where a lease for life contained a covenant that the lessee should not sell or assign without the permission of the lessor, and the lessee did sell and assign a part of the premises with the consent of the lessor, it was held that this did not amount to a surrender, but the lessee still remained liable for every act of his assignee amounting to a breach of the covenants contained in the lease. *Jackson, ex dem. Church and others, v. Brownson*, 227
 6. Where wood is cut down on leased land, by the lessee or his assigns, in such manner as materially to injure the inheritance, it is *waste*; and the lessee is liable to an action for the breach of the covenant against waste; and where the lease contained a clause of reëntry for a breach of the covenants and conditions in the lease, it was held that the lessor might maintain ejectment. *ib.*
 7. Where wild and uncultivated land, wholly covered with timber, is leased, the lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for *waste*; but he cannot cut down *all* the wood and timber, so as permanently to injure the inheritance. *ib.*
 8. And to what extent the wood and timber on such land may be cut down, without waste, is a question of fact for a jury to decide, under the direction of the court. *ib.*
 9. A lessor reserved one quarter of the money arising from every letting, assigning or disposing of the premises by the lessee, who covenanted, that whenever he should incline or be by law or otherwise, obliged to sell, &c., he would make the first offer to the lessor, giving him notice of the price, &c., and it was provided that every sale, renting, &c. should be void, and the premises revert to the lessor, unless the seller or purchaser should pay the lessor the one fourth of the money offered, &c. The tenant holding under the lease confessed a judgment, on which an execution issued, and the lease was sold by the sheriff. This was held not to be a breach of the covenant or condition in the lease; the judgment not having been confessed *fraudulently*, or for the purpose of enabling the creditor to take the lease and execution under the judgment, and with a view to defeat the lessor's right to the one fourth of the money offered, under the

- covenant. *Jackson, ex dem. Schuyler, v. Corliss*, 531
10. Where a tenant wilfully holds over, after the expiration of the term, and notice to quit, the landlord is entitled to *double rent*. *Hall v. Balentine*, 536
11. In an action of covenant for non-payment of rent reserved in a lease, if the plaintiff recovers less than 250 dollars, he is entitled only to costs of a court of common pleas. *Burke v. Platt*, 555

LEGACY.

1. An action at law lies against a devisee upon his express promise to pay a specific sum bequeathed as a legacy, and charged on land devised, made after the executors had assented to the legacy, and in consideration of the devisee's having become seised of the land under the devise. *Beecker v. Beecker*, 99
2. But whether an action of law will lie against a devisee or tertenant in possession of land charged with payment of a legacy, without such promise to pay the legacy? *Quære*. *ib.*

LIBEL.

1. In an action for a libel, the plaintiff, at the trial, may abandon any part of the libellous matter in any one count in his declaration, and the part so abandoned may be used in connection with the part retained, to show the meaning, and he will be entitled to recover, if the part retained be sufficient to sustain an action. *Genet v. Mitchell*, 120
2. Where a libel charged the plaintiff, who had been a minister of *France* to the *United States*, with having "traitorously betrayed the secrets of his government," and the proof was, that he had published his instructions; it was held that a public

- minister may, if he deems it necessary, publish his instructions; and whether, by such publication, he had traitorously betrayed the secrets of his government, is a mixed question, on which a jury, in this action, under the advice of the court, are to decide. *Genet v. Mitchell*, 120
3. An action for a libel lies against the proprietor of a *gazette* edited by another, though the publication was made without the knowledge of such proprietor. *Andres v. Wells*, 261
4. But where a printing press and newspaper establishment were assigned to a person, merely as security for a debt, and the press remained in the sole possession and management of the assignor, this was held not to be such an ownership in the person holding the security or lien, as would render him liable to an action, as proprietor. *ib.*
5. To publish of a member of Congress, "He is a fawning sycophant, a misrepresentative in Congress, and a grovelling office-seeker; he has abandoned his post in Congress in pursuit of an office," is libellous. *Thomas v. Crosswell*, 264
6. Whether the person libelled did leave his post for the purpose imputed to him, or had violated his duty as a representative in Congress, are questions for the jury to decide. *ib.*
7. Whether publications by the defendant, subsequent to the libel charged in the declaration, and which are, in themselves, libellous, can be admitted in evidence, to show the malice of the defendant in publishing the original libel? *Quære*. *ib.*
8. Though a person may publish a correct account of the proceedings in a court of justice, yet if he discolors or garbles the proceedings, or adds comments and insinuations of his own, in order to asperse the characters of the parties concerned, it is libellous. *ib.*

tend that a sufficient breach was proved. *Thomas v. Roosa*, 461

See COVENANT, 5. 10. SLANDER, 1, 2.

POOR, SETTLEMENT OF.

1. Under the 16th section of the act for the settlement of the poor, (24 sess. c. 184.) there must be an adjudication of two justices, after examining the pauper on oath, as to the place of his last legal settlement, before they can issue any warrant against the overseers for the expense of his maintenance. *Voorhis v. Whipple and Hawes*, 89
2. A subsequent adjudication, and a confirmation, on appeal, will not render a warrant previously issued valid; but it will be quashed, on the return to a *certiorari*. *ib.*

PRACTICE.

1. Where the plaintiff takes an assignment of the bail-bond, and brings an action against the principal and the bail to the arrest, and obtains a judgment, and issues execution, he cannot, afterwards, file common bail in the original suit, and proceed to judgment therein; but is concluded by his election to proceed on the bail-bond. *Beecker v. Simmons*, 119
2. Appearance in a suit waives all irregularity as to notice. *Rowley v. Stoddard*, 207
3. Where, on application of a defendant in ejectment, a demise is ordered to be struck out of the plaintiff's declaration, he must serve a certified copy of the rule for the amendment on the plaintiff, which shall be deemed an actual amendment, as to all subsequent proceedings on the part of the plaintiff, and the defendant, without a new copy of the declaration being served upon him, must enter into the consent rule, and plead 20

days after service of the certified copy of the rule for the amendment, unless otherwise ordered by the court; and the rule shall be sufficient to authorize an actual amendment of the declaration on file, or to file a new one in its stead, when ever it may become necessary. *Jackson, ex dem. Kelly and Oakley, v. Belknap*, 300

4. Payment of money into court admits the cause of action as stated in the plaintiff's declaration. *Johnston v. The Columbian Insurance Company*, 315
5. Where bail, in a court of common pleas, remove out of the county, an action on the recognizance may be brought in this court. *Davis v. Gillet and another*, 318
6. Where any difficulty arises in making up a *feigned issue*, ordered by the court, it must be settled before a judge, at his chambers. *Richards v. Brown*, 320
7. The court will not take notice of a *parol* agreement between attorneys, even as to bringing on a cause to trial at the circuit. *Parker v. Root*, 320
7. Where judgment is given for the plaintiff in the court below, and that judgment is reversed in the court above, on error, the plaintiff in error recovers no costs. *Pease and another v. Morgan*, 468
8. Where the defendant, after an appearance, entered a rule in vacation, to declare before the end of the next term, which was served on the agent of the plaintiff's attorney; it was held that the service of the notice of the rule might be at any time before the term, and if the plaintiff did not declare before the end of the term, his default might be entered, though *forty days* had not elapsed from the time of the serving the notice on the agent. *Dizen and Wife v. Bates*, 537
9. A person under recognizance to appear at a court of general sessions of the peace, while attending that court, was arrested on a *capias* out of this 491

- court, and held to bail; and this court ordered him to be discharged, on filing common bail, unless the plaintiff elected to waive the arrest, and take out new process. *Bours v. Tuckerman*, 538
10. Where a lessor, in an action of ejectment, was brought up on an attachment, for non-payment of costs, and he denied that he had ever consented to have his name used in the action; the court said that they could not receive his denial, in bar of the attachment, nor decide between the contradictory affidavits of the party and his attorney; but the party must pay the costs, and take his remedy over against the attorney, who inserted his name as lessor; but they stayed the proceedings, to give the party an opportunity to bring his action against the attorney, and to try the truth of the fact. *The People v. Bratt*, 539
11. A sheriff was discharged from an attachment for not returning an execution delivered to his deputy, 14 years ago, and who was dead. *The People v. Gilleland*, 555
12. After the lapse of 18 years, the court refused to permit a judgment to be entered up on a bond and warrant of attorney, on the usual affidavit, the legal presumption being that the bond was paid. *Executors of Clark v. Hopkins*, 556
13. After the lapse of 20 years, no judicial proceeding can be set aside for irregularity. *Thompson v. Skinner*, 556

See AMENDMENT. NEW TRIAL.

PROPERTY, ACQUISITION OF.

1. Where A. contracted with B. to build a vessel, and A. was to furnish the timber requisite to complete the frame of the vessel, and B. was to advance money to A., and also to furnish the materials for the joiners' work; and the vessel, while standing

on land hired by A., and in an unfinished state, was seized under a *feri facias* issued against A., and sold by the sheriff to C., who afterwards completed the vessel, and sold her to D. In an action of *trover*, brought by B. against D., it was held, that the property in the vessel was in D., and that B. could not have any property in the vessel, under the contract, until she was completed and delivered to him. *Merritt v. Johnston*, 473

2. When the materials of *John* are united with the materials of *Richard*, by the labor of *Richard*, who furnishes the principal materials, and those of *John* are only accessory, the right of property in the whole belongs to *Richard*, by right of *accession*. *ib.*
3. A purchase at a constable's sale at auction is not enough to prove property, in an action of trespass, unless the authority of the officer be also shown; for a sale by him, without authority, would give no title to the purchaser. *Carter v. Simpson*, 535

See BEES.

R.

RELEASE.

1. Where two are jointly and severally bound, the release of one of the obligors is the release of both; but a covenant with one of the obligors not to sue him, does not discharge the other obligor. *Rowley v. Stoddard*, 207
2. A release of one of two joint and several obligors, must be a technical release, *under seal*, in order to discharge both. *ib.*
3. A receipt in full, given to one of two joint and several debtors, on his paying half the debt, is no release of the other debtor. *ib.*

missioners in favor of the *grantor* in a deed, will enure to the benefit of the *grantee*; it being in favor of the title; and the grantee, there being no dispute between him and the grantor, need not enter his dissent. *Jackson, ex dem. Fonda and Ogden, v. Teele*, 28

2. None but persons *aggrieved* by the award need file a dissent; the act relative to the *Onondaga* titles (20 sess. c. 51.) applies only to interfering and adverse claims. *ib.*

P.

PATENT RIGHT.

The courts of this state have no jurisdiction in actions brought for the infringement of patent rights, granted by the *United States*. The cognizance of such actions belongs to the circuit courts of the *United States*. *Parsons v. Barnard*, 144

PATENTS OR GRANTS OF LAND.

1. An old patent or grant of land, after the lapse of 160 years, will not be allowed to be located or extended beyond the *actual* and notorious possession and location of the party; especially where there is the slightest evidence of an adverse possession for above 20 years. *Jackson, ex dem. Stoutenbergh, v. Murray*, 5
2. In all cases of uncertainty in the location of patents and deeds, courts hold the party to his actual location. *ib.*
3. Government is never to be presumed to grant land twice; and where K., who purchased, in 1689, lands granted to S., in 1667, took out a patent in 1671, which included lands said to be covered by the first patent, the persons deriving title under K. were estopped to say, that the location of the first grant

extended so as to include any part covered by the first patent. *ib.*

4. Where a grant of land, made in 1717, mentioned a *running stream* of water as one of the boundaries, and no actual location of the premises was made by the grantee or his heirs, the court refused, after the lapse of near a century, to extend a description, vague and uncertain, from a running stream which would take in the least, to a running stream which would include the greatest portion of land, so as to disturb the ancient possessions between the two streams. *Jackson, ex dem. Hardenbergh, v. Schoonmaker*, 12
5. Every presumption, after such a lapse of time, is to be taken against a party who neglects to have his land surveyed, and its boundaries accurately defined, or to reduce them into actual location, at the time; and the description in his deed will be construed so as to reduce his grant to the narrowest limits. *ib.*

PAYMENT OF MONEY INTO COURT.

Payment of money into court admits the cause of action, as stated in the plaintiff's declaration. *Johnston, v. Columbian Insurance Company*, 315

PLEADINGS.

1. If an insolvent, who has obtained his discharge under the insolvent act, undertakes to plead specially, and to state all the proceedings relative to his discharge, he must state a conformity to the directions of the act, in every respect; and if he does not state the facts correctly, and especially, if he omits to state that *three fourths* of his creditors, in amount, subscribed to his petition, &c., so as to give the judge jurisdiction, the plea is bad. *Frary v. Dakin*, 7

2. Where a promise is founded on a past consideration, it must be laid to have been done at *the request* of the party promising, or, at least, it must appear that he was under a moral obligation to do the act, or procure it to be done. *Comstock v. Smith*, 87
3. On a motion in arrest of judgment, in an action of *assumpsit*, the promise laid in the declaration is presumed to be an *express* promise. *Beecker v. Beecker*, 99
4. To an action of trespass, assault and battery, the defendant pleaded the general issue, and gave notice that he should offer evidence of *son assault demesne*; and the plaintiff, at the trial, proved that he ordered the defendant to leave the house of the plaintiff, and on the defendant's refusing, the plaintiff *molliter manus imposuit*, to put him out, when the defendant resisted, and struck the plaintiff. It was held that the defendant might give evidence to rebut the evidence of the *molliter manus imposuit*, or in mitigation of damages. *Collins v. Moulton*, 108
5. *Son assault, &c.*, is a justification, and when pleaded, the plaintiff must reply specially *molliter manus imposuit*, and cannot give it in evidence, under the general replication *de injuria sua propria, &c.* *ib.*
6. If a declaration in trespass commences with the words "for that *whereas*," &c., it is bad, on a special demurrer; but after verdict, the words may be rejected as surplusage. *ib.*
7. Where the plaintiff declares on a special agreement, and attempts to recover thereon, but fails altogether, he may recover on a general count in his declaration, if the case is such, that if there had been no special agreement, he might have recovered on a general count, as for money had and received. *Tuttle v. Mayo*, 132
8. Any matter arising since issue joined in a cause, and which might be pleaded *puis darrein continuance*, must be so pleaded, and cannot be given in evidence under the general issue. *Jackson, ex dem. Colden and others, v. Rich*, 194
9. To a plea of the statute of *usury*, the plaintiff may reply directly, that it was not corruptly agreed, in manner and form, &c., without a traverse, and conclude to the country. *Waterman v. Haskin*, 283
10. The infancy of the plaintiff is not a ground of nonsuit, at the trial, but must be pleaded in abatement. *Schemerhorn v. Jenkins*, 373
11. By pleading in chief, the defendant admits the due appearance of the plaintiff. *ib.*
12. Where a declaration on a promissory note alleged that the defendant did not pay the money mentioned in the note, &c., and the defendant pleaded, *puis darrein continuance*, that he "paid to the plaintiff the several sums of money mentioned in the plaintiff's declaration;" on demurrer, the plea was held good, being as broad as the declaration; and there was no necessity of stating that the plaintiff accepted it in satisfaction. *Cheuv v. Woolley*, 399
13. In an action *qui tam*, brought by a common informer, under the 2d section of the act for preventing *usury*, (10 sess. c. 13.) the declaration must state that the party aggrieved neglected to sue within the year, in order to give the plaintiff a right of action. *Morrell v. Fuller*, 402
14. Where a promissory note, payable in *chattels*, was declared upon as under the statute; and the breach assigned was, that the defendant did not pay the money mentioned in the note, &c., it was held, after verdict, that the reference to the statute might be rejected as surplusage, and the defect in assigning the breach was aided by the verdict, so that the court would in-

mitigation of damages; and where the jury, in such a case, gave the plaintiff *nominal* damages only, the court refused to set aside the verdict. *Russell v. Turner*, 189
Whether, if the plaintiff had retained the security for his debt, the sheriff could have availed himself of that fact, in his defence to an action for the escape? *Dubitatur*.

ib.

Where a gaoler discharged a defendant taken on execution, on his executing to him a bond and warrant of attorney for the amount of the debt, and additional charges; the court set aside the judgment entered up on the bond, so that the defendant might avail himself of any defence at law. *Richmond v. Roberts*, 319

• Whether such a bond, taken by a sheriff or gaoler, is not against the statute, as taken for ease and favor, and by color of office? *Quære. ib.*

i. A sheriff cannot, with his own money, pay the plaintiff on an execution, and afterwards levy the execution out of the property of the defendant; nor can he take a bond or other security, and detain the execution in his hands, and use it, afterwards, to enforce the payment of the money advanced by him. *Reed v. Pruyn and Staats*, 426

h. *Assumpsit* lies against a deputy-sheriff upon an express promise to pay money collected by him on an execution, to the plaintiff; but the promise must be clear and absolute. *Tuttle v. Love*, 470

i. Where, after an *escape* of a prisoner on execution, and return into custody, the sheriff went out of office, and assigned the prisoner to his successor, and while in his custody, the prisoner applied to the court for his discharge, under the act for the relief of debtors, &c., and the plaintiff, not knowing of the escape, opposed the application, in consequence of which the prisoner remained in custody; it was held, that this was not such an election

to affirm the debtor in custody as amounted to a waiver of the plaintiff's remedy against the former sheriff for the escape. *Dash v. Van Kleeck*, 477

21. The act of the 28th of April, 1810, (33d sess. c. 187.) is no bar to an action brought against a sheriff prior to the passing of that act, for the previous *escape* of a prisoner in his custody, and who had been admitted to the gaol-liberties, on giving bonds pursuant to the act of the 30th of March, 1801, (24th sess. c. 91. s. 6.) *ib.*

See PRACTICE, 11.

SHIP AND SHIP OWNERS.

1. A regular bill of sale is not essential to transfer the property in a ship or vessel; but the same passes by delivery, like any other chattel. *Windsor and others v. Hogeboom and others*, 308

2. The law of the *United States*, requiring the register to be inserted in the bill of sale, on every transfer of the vessel, does not affect the validity of the transfer, but only the character and privileges of the vessel, as an *American* ship. *ib.*

3. Where a person supplied stores to a ship, of which there were several owners, on the order of one of them, who acted as ship's husband, and took his note in payment, and gave a receipt in full, it was held to be no discharge of the other owners, especially as it did not appear that the plaintiff knew, at the time, that there were other owners. *Schemerkorn v. Loines and others*, 311

See AGENT, 2, 3. TROVER, 3.

SLANDER.

1. In an action of slander, the declaration stated, that the plaintiff was a justice of the peace, and that the

defendant, meaning to injure him, and expose him to prosecution, for corruption, &c., in a certain discourse, &c., said of the plaintiff, in his office of a justice, "*Lindsey* (meaning the plaintiff) had been feed by A. W., (meaning A. W., who lately had a cause pending, and determined before the plaintiff,) and that he (the defendant) could do nothing when the magistrate was in that way against him." On motion, in arrest of judgment, the declaration was held sufficient. *Lindsry v. Smith*, 359

- 2 Though an *innuendo* cannot supply the place of a *colloquium*, yet if there be a *colloquium* sufficient to point the application of the words to the plaintiff, if spoken maliciously, he must have judgment. *ib.*

SLAVE.

1. The owner of a slave gave a written promise to manumit such slave, in 8 years, on condition of his faithful service during that period; this was held to be a conditional manumission, obligatory on the master, and of which the slave might avail himself, on the performance of the condition. *Ketteltas v. Fleet*, 324
2. After giving such a written covenant, which was delivered to the custody of a third person, the master sold the slave absolutely, for his full value; though he was informed, at the time of the sale, that the slave had been promised his freedom in 8 years, but did not know of the written covenant until after the purchase, when he returned the slave to the vendor, and rescinded the contract. In an action brought by the vendor against the vendee to recover the purchase-money, it was held, that the vendee being ignorant of the existence of the written covenant, at the time of the sale, the con-

cealment was a fraud, and vacated the contract. *Ketteltas v. Fleet*, 324

STATUTES.

1. A statute is not to be construed to operate *retrospectively*, so as to take away a vested right. *Dask v. Van Kleeck*, 477
2. It is a principle of legislation, that laws, civil or criminal, must be *prospective*, and are not to have a *retroactive* operation. *ib.*

STATUTES CONSTRUED, EXPLAINED, OR CITED.

1783. Feb. 14. 6 sess. ch. 12. (Private Lotteries,) 435
 1786. April 18. 9 sess. ch. 40. (Loan Officers,) 332
 1787. Jan. 26. 10 sess. ch. 4. (Dower,) 206. 248
 —. Feb. 8. 10 sess. ch. 13. (Usury,) 403
 —. Feb. 25. 10 sess. ch. 44. (Frauds,) 206
 1788. Feb. 21. 11 sess. ch. 36. (Rents and Distresses,) 536
 —. Feb. 21. 11 sess. ch. 85. (Indians,) 295
 1789. Feb. 20. 12 sess. ch. 29. (Loan Officers,) 332
 1795. April 9. 10 sess. ch. 68. (Loan Officers,) 332
 1801. Feb. 20. 24 sess. ch. 9. (Wills,) 396
 —. March 20. 24 sess. ch. 28. (Sheriffs and Gaolers,) 108. 160
 —. —. 21. 24 sess. ch. 49. (Debtors, Absent and Absconding,) 209
 —. —. 24. 24 sess. ch. 66. (Debtors, Imprisoned,) 116
 —. —. 30. 24 sess. ch. 85. (Champerty and Maintenance,) 251
 —. —. 30. 24 sess. ch. 91. (Gaol-Liberties,) 477
 —. April 3. 24 sess. ch. 131. (Debtors, Insolvent,) 374
 —. —. 4. 24 sess. ch. 147. (Indians,) 296

RELIGIOUS SOCIETY.

Where the members of an incorporated religious society subscribed a written agreement with the trustees of the society, by which they individually engaged to pay to the trustees, or such persons as the trustees should appoint, the sums set opposite to their respective names, for the purpose of raising a *salary*, for the support of S., a minister of the gospel, to be paid annually, so long as S. should administer the gospel in the said society, and so long as the subscribers should reside within four miles from the meeting-house in the said society, &c. It was held that this was a valid contract, in law, and binding on the subscribers so long as S. continued to administer the gospel, and the subscribers to reside within the distance of four miles, and could not be dissolved but by mutual consent, nor cease to be obligatory, until the minister ceased to render the services stipulated. *Religious Society of Whitestown v. Stone*, 112

REPLEVIN.

Replevin lies for any *tortious* or unlawful taking of goods, and not merely in cases of a *distress*. *Pangburn v. Patridge*, 140

S.

SALE.

1. If a man sells a different interest from that which he pretends to sell, and especially, if the contract is founded in ignorance and fraud, the purchaser of the chattel may return it to the vendor, if he does so immediately after the discovery of the imposition, and thereby rescind the contract. *Ketletas v. Flect*, 324

2. Purchase at a constable's sale is not sufficient to prove property, unless the authority upon which the constable acted be also shown; for a sale by the officer, without authority, would give no title to the purchaser. *Carter v. Simpson*, 535

See SHIP. SLAVE, 2

SHERIFF.

1. An action lies against a sheriff for the act of his deputy, for taking more fees, on levying an execution, than is allowed by law; and whether the sheriff recognized the act of his deputy, or not, need not be shown. *M'Intyre v. Trumbull*, 35
2. In *February*, 1807, a sheriff arrested a person on a *capias ad resp.*, returnable in the *May* term following, and the defendant was detained in custody until *March*, when a new sheriff was appointed, and the prisoner was assigned over to the new sheriff; the writ, however, was returned by the old sheriff *cepi corpus in custodia*. Soon after the assignment of the prisoner, he was discharged by the new sheriff, on giving a bail-bond. The plaintiff knew of the taking of the bail, but proceeded to judgment, and took out a *ca. sa.*, which being returned *non est inventus*, he brought an action against the new sheriff for an *escape*. It was held, that the new sheriff was bound to discharge the prisoner at any time before the return of the *capias ad resp.*, on his tendering sufficient bail, and that he was not liable for an *escape*. *Richards and others v. Porter, Sheriff*, 137
3. The old sheriff, after he was out of office, had no right to return the writ, but should have delivered it to the new sheriff, with the assignment of the prisoner, so that the new sheriff might return it with his endorsement of the discharge of the defendant on bail, by which the plaintiff would have known the situ-

- ation of the defendant. The new sheriff was not bound to give notice to the plaintiff of his having let the defendant to bail. *Richards and others v. Porter, Sheriff*, 137
4. Whether the new sheriff would be responsible in such a case, without a delivery of the writ to him by the old sheriff? *Quære. ib.*
 5. Where an under-sheriff took a bond to indemnify him for all costs and damages for not taking *N. P.* (against whom the sheriff held a *ca. sa.*, at the suit of *L.*, to prison) as security for the debt; the bond was held to be void, as taken for ease and favor, or by color of his office, and in other form than that prescribed by the statute. *Love v. Palmer and others*, 159
 6. In an action against a sheriff for an escape of a prisoner charged in execution, it is sufficient evidence, *prima facie*, on the part of the plaintiff, to entitle him to recover, that the prisoner was seen at large walking in the street. *Stewart v. Kip*, 165
 7. In an action brought by a sheriff, on a bond taken for his security, on granting the liberties of the gaol to a prisoner on execution, against the sureties, the record of a judgment of recovery against the sheriff for an escape of the prisoner, is conclusive evidence for the plaintiff. *Kip v. Brigham and others*, 163
 8. And where a verdict was recovered against the sheriff for the escape of a prisoner, who had given security for the liberties of the gaol, it was held, that the *postea* was evidence without the judgment, (in an action by the sheriff on a bond,) to prove the recovery and actual damage, at least, if not the escape. *ib.*
 9. The sheriff is entitled to recover, against the sureties on the bond for the gaol-liberties, not only the amount of the debt and costs in the original suit, but also the costs of defending the suit against himself for the escape. *ib.*
 10. A person who has given security for the liberties of the gaol, is bound, at his peril, and at the risk of his sureties, to keep within the liberties: and though the limits established by the Court of Common Pleas are in any part vague and indefinite, it is the duty of the prisoner to keep in places clearly defined, and within the limits; for he is bound to know and observe the limits. It is not the duty of the sheriff to ascertain the bounds of the liberties; but he is required to let the prisoner on execution go at large within the liberties when established by the Court of Common Pleas. *Kip v. Brigham and others*, 168
 11. Where the bounds of the liberties of the gaol were marked by no visible monuments, and the survey of them, as appointed by the Court of Common Pleas, was, in some parts, vague and uncertain; and a prisoner who had given a bond to the sheriff for the liberties, without intending to go beyond them, went into a house within the *reputed* limits, but which proved not to be within the acknowledged *actual* liberties, and returned within the actual liberties before suit brought; it was held, that this being an inadvertent and involuntary escape, and a return before suit brought, the sheriff was not liable for an escape. *Ballou v. Kip*, 175
 12. Do not the *reputed* liberties, in such a case, afford the best evidence of the actual liberties of the gaol? *ib.*
 13. In an action on the case against a sheriff for an escape on *mesne process*, the plaintiff can recover damages only for what he has lost by the escape; and the jury may find such damages as they may think the plaintiff has sustained, under all circumstances. *Russell v. Turner*, 189
 14. If the plaintiff, having real and competent security for his debt, from the defendant, relinquishes it, after knowledge of the escape, the sheriff, in an action against him, may avail himself of this fact in

- 1801 April 4. 24 sess. ch. 153. (Al-
bany,) 541
—, — 6. 24 sess. ch. 155. (Deeds,) 87
—, — 7. 24 sess. ch. 164. (Inns
and Taverns,) 134
—, — 7. 24 sess. ch. 166. (Militia,) 96
—, — 7. 24 sess. ch. 174. (Exec-
utors and Administrators,) 104
—, — 8. 24 sess. ch. 134. (Poor,) 89
—, — 8. 24 sess. ch. 186. (High-
ways,) 108
—, — 8. 24 sess. ch. 188. (Slaves,) 330
1807. March 20. 30 sess. ch. 43. (Su-
pervisors,) 63
—, April 3. 30 sess. ch. 122. (Ca-
yuga Clerk's Office,) 63
—, — 7. 30 sess. ch. 181. (Lottery
Tickets,) 437
1808. — 8. 31 sess. ch. (Reli-
gious Society of Whitestown,) 115
—, — 8. 31 sess. ch. 163. (Deb-
tors, Insolvent,) 116
—, — 11. 31 sess. ch. 204. (Jus-
tices' Courts,) 277. 358. 382
1809. March 29. 32 sess. ch. 165.
(Militia,) 99
—, — 32 sess. ch. 189. (Mo-
hawk Turnpike Bridge,) 179. 183
1810. April 28. 33 sess. ch. 187. (Es-
capes,) 477

SURETY.

1. In an action brought against a sure-
ty on a bond, given for the faith-
ful discharge of his duty as loan
officer, under the act, (9 sess. c.
40.) it was held, that the surety
might set up in his defence the
laches of the *supervisors* of the
county, in not discharging and
prosecuting the loan officer for his
first default, but suffering him to
continue, after repeated defaults,
for upwards of *ten* years, when the
loan officer became insolvent, and
without prosecuting the loan of-
ficer, as required by the act. *The*
People v. Jansen and others, 332
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2. And where no notice was taken of
the defaults of the principal, until
after the death of the surety, this
laches of the supervisors was held
to be a good defence, especially in
a suit against the heirs of the sure-
ty. *The People v. Jansen and*
others, 332

SURVEY OF LAND.

See DEED, 5, 6

T.

TENANCY.

1. Where an acknowledgment of
tenancy, on the part of the defend-
ant in ejectment, has been proved,
he will not be allowed to give evi-
dence to disprove or contradict the
title of his landlord. *Jackson, ex*
dem. Van Alen and others, v. Vos-
burgh, 186
2. Whether there be a tenancy or not,
is a matter of fact, and parol evi-
dence may be received to disprove
it. *ib.*

TENANT AT WILL.

- A tenant at will is considered as hold-
ing from year to year, only for the
purpose of a notice to quit; but he
has no right to such notice, after
he has determined his will, by an
act of voluntary waste. *Phillips*
v. Covert,

TENDER.

See COVENANT, 12.
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TRESPASS.

1. Trespass lies against a tenant *at will*, for a voluntary waste, as in cutting timber; for the injury amounts to a determination of the tenancy. *Phillips v. Covert*, 1
2. A person who finds a tree on the land of another, containing a swarm of bees, and marks it with the initials of his name, does not thereby acquire any property in the bees, so as to enable him to maintain trespass against a person for cutting down the tree and carrying away the bees. *Gillet v. Mason*, 16
3. A. brought an action of trespass against B. for destroying a stack of *hay* belonging to the plaintiff. The plaintiff proved that he bought the hay, which was on the land of B., at a constable's sale, at public auction. It was held that the plaintiff was bound to prove property in the hay; and that proving a purchase at a constable's auction was not enough, without showing the authority under which the constable acted; for a sale by the officer, without authority, would not give a title to the purchaser. *Carter v. Simpson*, 535

See PLEADINGS, 4, 5, 6.

TRESPASS QUARE CLAUSUM FREGIT.

1. In an action of trespass *quare clausum fregit*, brought before a justice's court, the defendant interposed a plea of *title*; and the same was removed into the Court of Common Pleas, and from thence into this court; and it was held, under the 7th section of the act, (31 sess. c. 204.) the defendant, at the trial, might show a title in himself, or a title in a third person, or a possession out of the plaintiff; and where the defendant in such action proved that he was, and had

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been, in possession of the *locus in quo* for more than six years, and the plaintiff had never been in possession; this was held sufficient to entitle the defendant to a verdict.

Douglass v. Valentine, 273

2. Where A., the owner of land, wrote a letter, dated the 27th *March*, 1804, to B., saying, "I will consent to your taking my timber upon the terms proposed in your letter, but restricting you to that which has been injured by fire, in the first place, preferring that you should begin between *Baxter's* lot and the creek," &c.; and on the 31st *March*, 1806, he executed a power of attorney to C., with authority to revoke the permission given to B., and which, on the 6th *July*, 1806, was shown to B., who was forbidden to cut any more timber. It was held, that the letter to B. was a mere license to cut timber, and revocable; and that B. was liable to an action of trespass for all the timber cut by him, after notice of the revocation; and that if the letter of A. was founded on any propositions of the defendant, so as to make a contract, which might justify the trespass, it was incumbent on the defendant to show such proposition. *Tillotson v. Preston*, 285

TROVER.

1. To constitute a *conversion* sufficient to support the action of *trover*, it is not necessary to show a manual taking of the thing in question; nor that the defendant has applied it to his own use; but the assuming the right to dispose of it, in exercising a dominion over it, to the exclusion, or in defiance of the plaintiff's right, is a *conversion*. *Bristol v. Exet*, 254
2. Where the goods of A., in the custody of the agent of the state prison, were, by the direction and command of B., one of the inspectors of the prison, refused to be delivered to

A. on demand; it was held, that B. was liable to an action of *trover* for the goods so detained by his command and authority. *Shotwell v. Fitt*, 302

3. Where A. contracted with B. to build a vessel, and A. was to furnish the *timber* requisite to complete the frame of the vessel, and B. was to advance money to A., and also to furnish the materials for the joiners' work; and the vessel, while standing on land hired by A., and in an unfinished state, was seized under a *fiat facias* issued against A., and sold by the sheriff to C., who afterwards completed the vessel and sold her to D. In an action of *trover* brought by B. against D., it was held, that the property in the vessel was in D., and that B. could not have any property in the vessel, under the contract, until she was completed and delivered to him. *Merritt v. Johnston*, 473

dollars, when, in truth and in fact, the shares were worth only 250 dollars; and that, in pursuance of such agreement, the defendant did purchase the shares, &c., and executed the bond, as well for the 687 dollars lent, as the 400 dollars to be paid for the shares, and for the forbearance of the 687 dollars, &c. On a demurrer to this plea, the bond was held to be *usurious* and void. *Roe v. Dickson*, 196

2. To a plea of the statute of *usury*, the plaintiff may reply directly that it was not corruptly agreed in manner and form, &c., without a traverse, and conclude to the country. *Waterman v. Haskin*, 283
3. In an action *qui tam*, &c., brought by a common informer, under the 2d section of the statute for preventing *usury*, the declaration must state that the party aggrieved neglected to sue within one year, in order to give the plaintiff a right of action. *Morrell v. Fuller*, 402

TURNPIKE COMPANY.

See MOHAWK TURNPIKE AND BRIDGE COMPANY.

V.

U.

VERDICT.

USURY.

1. In an action of debt on a bond, dated *October 20, 1808*, conditioned to pay 1,087 dollars, the defendant pleaded that it was *corruptly* agreed between the plaintiff and defendant, that the plaintiff should lend the defendant 687 dollars, to be repaid on the 1st *November, 1811*; and that the plaintiff should forbear and give time for the payment of the 687 dollars to the 1st *November, 1811*, and for such forbearance the defendant should purchase of the plaintiff 16 shares of turnpike stock, to be delivered, &c. for 400

1. After a verdict is pronounced in court, by a jury, they may alter it, before it is received and recorded. *Blackley v. Sheldon*, 32
2. After a verdict is received, the jurors may be examined by the *poll*, and either of the jurors may disagree to the verdict. *ib.*
3. After a jury have retired, to consider of their verdict, they may return into court and hear evidence as to any matter of which they have doubts. *ib.*
4. The court may send a jury back, to reconsider their verdict, before it is recorded, if there is any mistake. *ib.*

W.

WAGER.

1. A *wager* contract is void, if it is against the principles of public policy. *Mount and Wardell v. Waite*, 434
2. The insurance of lottery tickets is against public policy, especially since the act of the 7th April, 1807, made to restrain the insurance of lottery tickets, declared it to be a public misdemeanor to insure tickets in lotteries authorized by this state, and the act of the 17th February, 1809, has extended the provisions of that act to all lotteries whatever, foreign or domestic; and though the action was on an in-

surance of tickets in a foreign lottery, and made prior to the act of the 17th February, 1809, (sess. 33 c. 36.) the contract was held void. But the insured, not having violated any statute, was held not to stand *in pari delicto*, and therefore entitled to recover back the *premium* paid for the insurance. *Mount and Wardell v. Waite*, 434

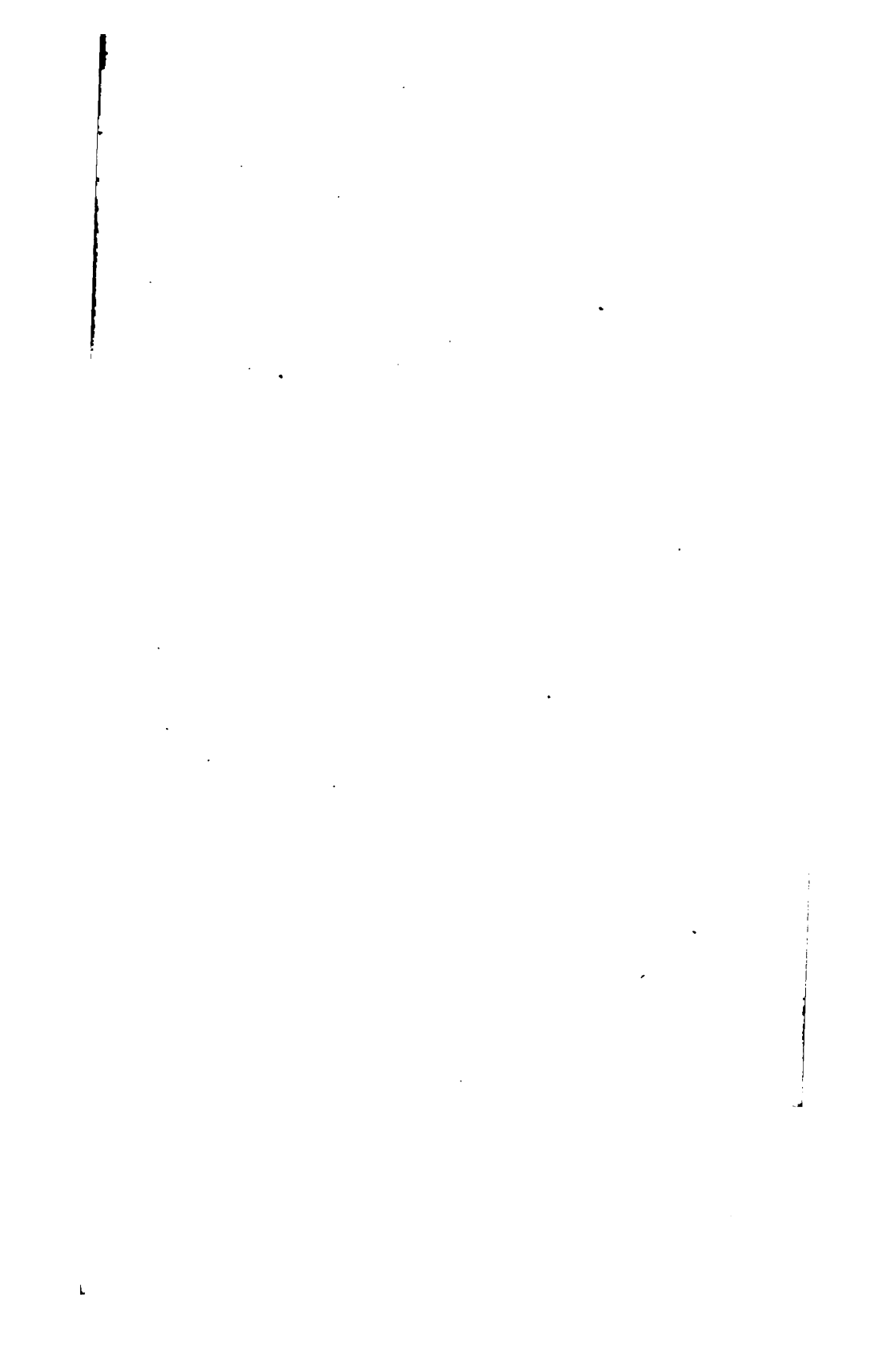
WASTE.

See LEASE.

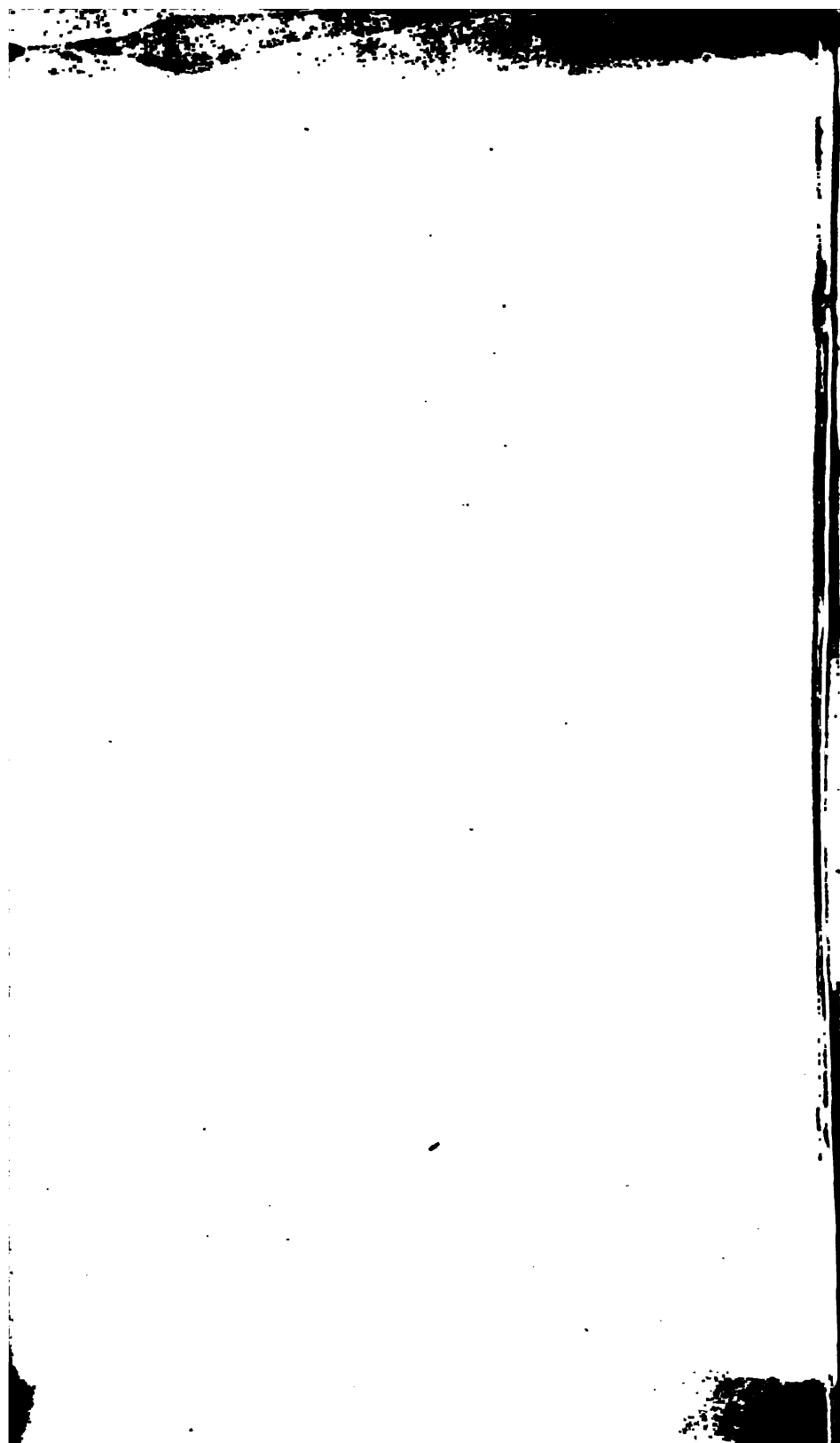
WRIT.

See EVIDENCE, 3.

END OF THE SEVENTH VOLUME.







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